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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 133.

HARRY I. MULCREVY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFFS IN ERROR,

vs.

CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED DECEMBER 1, 1911.

(22,948)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 14, 1913.

a In the Supreme Court of the United States.

HARRY I. MULCREVY et al., Plaintiffs in Error,
vs.
CITY AND COUNTY OF SAN FRANCISCO, Defendants in Error.

Papers Enclosed in the Above Entitled Cause.

1. Certified Copy of Original Transcript on file in the District Court of Appeal, First Appellate District.
2. Certified Copy of Original Judgment in the District Court of Appeal, First Appellate District.
3. Certified Copy of Original Petition for Transfer of Cause after Judgment in the District Court of Appeal, First Appellate District.
4. Certified Copy of Original Order Denying Hearing in the Supreme Court after Judgment in the District Court of Appeal, First Appellate District.
5. Certified Copy of Original Petition for Writ of Error.
6. Certified Copy of Original Assignment of Error.
7. Certified Copy of Bond, H. I. Mulcrevy, et al., Plaintiffs in Error.
8. Certified Copy of Bond, H. I. Mulcrevy and Fidelity and Deposit Company of Maryland, Plaintiffs in Error.

Also

9. The Original Writ of Error.
10. The Original Citation.
11. Clerk's Certificate of return.

b In the Supreme Court of the State of California.

S. F. No. 5354.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, Plaintiff and Respondent,
vs.
HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendants and Appellants.

TRANSCRIPT ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Hon. J. M. Seawell, Judge.

Jas. F. Tevlin, Attorney for Appellant Harry I. Mulcrevy.
L. A. Redman, Attorney for Appellant Fidelity and Deposit Company of Maryland.
Percy V. Long, City Attorney, Attorney for Respondent.

Filed this 18th day of September, A. D. 1909.
FRANK L. CAUGHEY, *Clerk*.
By H. G. GRANT,
Deputy Clerk.

1 In the Supreme Court of the State of California.

S. F. No. —.

In the Superior Court of the State of California in and for the City and County of San Francisco.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, Plaintiff,

vs.

HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendants.

Complaint on Official Bond.

Plaintiff complains and alleges:

I.

Plaintiff is, and at all times hereinafter mentioned it has
2 has been, a municipal corporation duly organized and incorporated as such under and in accordance with the laws of the State of California.

Plaintiff is, and ever since January 8, 1900, it has been governed by a charter, which was duly and regularly enacted and adopted as required by law and was approved by the Legislature of the State of California on January 26, 1899.

II.

Defendant Fidelity and Deposit Company of Maryland is, and at all times hereinafter mentioned it has been a corporation duly and regularly incorporated as such under and in accordance with the laws of the State of Maryland.

III.

Defendant Harry I. Mulcrevy is, and at all times hereinafter mentioned he has been a citizen and resident of the City and County of San Francisco, State of California. At a general municipal election duly held in accordance with law in the City and County of San Francisco, State of California, on the seventh day of November, 1905, the defendant Harry I. Mulcrevy was duly and regularly elected as County Clerk of the City and County of San Francisco for the term of two years commencing on the eighth day of January, 1906.

3 IV.

Thereafter and on the first day of December, 1905, the said Harry I. Mulcrevy made and filed, in the manner and form prescribed by law, his official bond as such County Clerk of said City and County of San Francisco. Said bond was made and executed by said de-

fendant Harry I. Mulcrevy as principal, and by the defendant Fidelity and Deposit Company of Maryland as surety. Said bond was duly and regularly approved by seven Judges of the Superior Court of the City and County of San Francisco, and by the Mayor and Auditor of said City and County, as required by law. Said bond remained in full force and effect during the entire term of office of said Harry I. Mulcrevy as such County Clerk, as herein set forth. A true, full and correct copy of said bond with the endorsements thereon is hereunto annexed, marked Exhibit "A", and by this reference is made a part hereof.

V.

Thereafter, and prior to entering upon the duties of his office, the said defendant Harry I. Mulcrevy duly and regularly filed his oath of office as required by law.

On January 8, 1906, the said defendant Harry I. Mulcrevy entered upon the discharge of his duties as such County Clerk, and he continued to discharge the same and he was the duly elected, qualified and acting County Clerk in and for the City and County of San Francisco, State of California, for the full term for which he was elected, to-wit: from January 8, 1906, to and until January 8, 1908. During his entire term of office, as aforesaid, the said Harry I. Mulcrevy was by virtue of his office as such County Clerk, the Clerk of the Superior Court of the State of California in and for the City and County of San Francisco.

VI.

During his term of office, as aforesaid, the said defendant Harry I. Mulcrevy, as such County Clerk and ex-officio Clerk of the Superior Court of the City and County of San Francisco, performed certain official services in connection with the naturalization of aliens under the laws of the United States, to-wit: the said Harry I. Mulcrevy, as such County Clerk and ex-officio Clerk of the Superior Court of the City and County of San Francisco and as part of his official duties, received and filed the declarations of sundry aliens of their intention to become citizens of the United States and issued duplicates of such declarations to said declarants; and said Harry I. Mulcrevy, as such Clerk, as aforesaid, and as part of his official duties, also made, filed and docketed the petitions of sundry aliens for admission as citizens of the United States, and entered final orders on sundry of said petitions and issued sundry certificates of citizenship thereunder.

All of the aforesaid services were rendered and performed by the said defendant Harry I. Mulcrevy, as such clerk as aforesaid, under and in accordance with the provisions of that certain Act of Congress, approved June 29, 1906, entitled "An Act to Establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States."

VII.

Under and in accordance with the provisions of the aforesaid Act of Congress the said defendant Harry I. Mulcrevy, as such Clerk aforesaid, was entitled to receive and collect, and he did receive and collect from the persons for whom said services were rendered, as aforesaid, and as fees for the performance of the aforesaid official services the total sum of fifty nine hundred and forty-four (5,944) dollars. Said sum was collected and received by said defendant at the following dates and in the following amounts, to-wit:

For the quarter year ending Dec. 31, 1906	$1,011
For the quarter year ending Mch. 31, 1907	1,179
For the quarter year ending June 30, 1907	1,295
For the quarter year ending Sep. 30, 1907	1,331
For the quarter year ending Dec. 31, 1907	1,128
	$5,944

Under and in accordance with the provisions of the aforesaid Act of Congress, the said defendant Harry I. Mulcrevy, as such Clerk, as aforesaid, was required to account for and remit to the Bureau of Immigration and Naturalization of the United States, at the expiration of every quarter year, one half of the fees so collected by him, as aforesaid; and said defendant Harry I. Mulcrevy, as such Clerk as aforesaid, has heretofore accounted for and remitted to said Bureau of Immigration and Naturalization of the United States, one half of all of said fees, so received by him, as required by the aforesaid Act of Congress.

The said defendant Harry I. Mulcrevy has retained ever since said fees were collected by him, as aforesaid, and still retains for his own use and in his own custody and possession one half of all the aforesaid fees collected by him, as aforesaid, amounting to the sum of twenty nine hundred and seventy-two (2,972) dollars.

VIII.

The Charter of the plaintiff, the City and County of San Francisco, provides that all moneys which may be collected or received by any officer of said City and County in his official capacity, or for the performance of any official duty, shall be paid by such officer into the treasury of said City and County. Said Charter further provides that no salaried officer of said City and County shall receive or accept any fee, payment or compensation directly or indirectly for any services performed by him in his official capacity; and said Charter provides further that the salaries provided in said Charter shall be in full compensation for all services rendered by all salaried officers, and that every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of said City and County within twenty-four hours after receipt of the same.

During all of the times in this complaint mentioned the said

defendant Harry I. Mulcrevy, as such Clerk as aforesaid, was a salaried officer of said City and County of San Francisco, whose salary was fixed by the aforesaid Charter and was paid to him by the plaintiff as in said Charter provided.

IX.

Under and in accordance with the provisions of the aforesaid Charter the said sum of twenty nine hundred and seventy two (2,972) dollars collected and retained by said defendant Harry I. Mulcrevy as fees, as aforesaid, was collected and received by him as said Clerk as aforesaid, to and for the use and benefit of the plaintiff, the City and County of San Francisco. Said sum is now the property of said plaintiff, and plaintiff is entitled to the immediate possession and payment of the same. The payment of the aforesaid sum into the treasury of plaintiff is an official duty which is imposed upon and required of said defendant Harry I. Mulcrevy, as such Clerk as aforesaid, by the aforesaid Charter of plaintiff.

X.

Demand has heretofore been made by plaintiff upon the said defendant Harry I. Mulcrevy that he forthwith pay over into the treasury of plaintiff the said sum of twenty nine hundred and seventy-two (2,972) dollars so collected and retained by him as aforesaid; but said defendant has refused and still refuses to pay over the said sum or any part thereof, and he still retains the whole of said sum for his own use and in his own possession.

Wherefore plaintiff demands judgment against defendants for the sum of twenty nine hundred and seventy-two (2,972) dollars with interest at the rate of seven (7) per cent per annum to date of judgment upon the following amounts from the following dates, to-wit: upon the sum of $505.50 from December 31, 1906; upon the sum of $589.50 from March 31, 1907; upon the sum of $647.50 from June 30, 1907; upon the sum of $665.50 from September 30, 1907, and upon the sum of $564 from December 31, 1907, and for costs of suit.

PERCY V. LONG,
City Attorney, Attorney for Plaintiff.

EXHIBIT "A."

Official Bond of Harry I. Mulcrevy.

Whereas Harry I. Mulcrevy was, at the election held on the seventh day of November, 1905, duly elected to the office of the County Clerk in and for the City and County of San Francisco, State of California.

And, Whereas, the said Harry I. Mulcrevy is required by law to file an official bond previous to entering upon the duties of said office; and whereas, the amount of such bond has been fixed at fifty thousand and 00/100 ($50,000.00) dollars.

Now, Therefore, Know All Men by These Presents, that we Harry

I. Mulcrevy of the City and County of San Francisco, as principal, and Fidelity and Deposit Company of Maryland, a corporation, organized under the laws of the State of Maryland, as surety, are jointly and severally bound and indebted unto the City and County of San Francisco and State of California in the sum of Fifty Thousand and 00/100 ($50,000.00) Dollars, lawful money of the United States of America, for the payment of which sum of money, well and truly to be made, the parties jointly and severally indebted herein as aforesaid, jointly and severally bind themselves, their heirs, executors and administrators, successors or assigns, firmly by these presents: Sealed with our seals and dated this 1st day of December in the year of our Lord one Thousand nine hundred and five.

The condition of this obligation is such that if the above bounded Harry I. Mulcrevy, principal, shall faithfully perform all official duties that now are or may hereafter be imposed upon or required of him by law, ordinance or the charter of the City and County of San Francisco, and shall at the expiration of his term of office surrender to his successor all property, books, papers and documents that may come into his possession as such County Clerk, and further if all his deputies, assistants, clerks and employees appointed by him and all and each of them shall faithfully perform all the duties that now are, or hereafter may be lawfully imposed or required of them and of any and of each of them as such deputies, assistants, clerks or employees, then this obligation to be void, otherwise to remain in full force and effect.

[CORP'N SEAL.] H. I. MULCREVY. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.
By H. A. WAGNER, *Its Attorney in Fact.*

Signed and sealed in presence of
H. J. MAXWELL.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this first day of December in the year one thousand nine hundred and five, before me, Frank L. Owen, a Notary Public in and for the said City and County, residing therein, duly commissioned and sworn, personally appeared H. A. Meyer, known to me to be the person whose name is subscribed to the within instrument as the Attorney in Fact of the Fidelity and Deposit Company of Maryland, and acknowledged to me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto as principal and his own name as Attorney-in-fact.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[SEAL.] FRANK S. OWEN,
Notary Public in and for the City and County
of San Francisco, State of California.

(Endorsed.)

Approved:

THOMAS F. GRAHAM,
Judge of the Superior Court.
FRANK J. MURASKY,
Judge of the Superior Court.
J. V. COFFEY,
Judge of the Superior Court.
J. C. B. HEBBARD,
Judge of the Superior Court.
M. C. SLOSS,
Judge of the Superior Court.
JAS. M. TROUTT,
Judge of the Superior Court.
JOHN HUNT,
Judge of the Superior Court.

Approved this first day of December, 1905.

E. E. SCHMITZ, *Mayor.*
HARRY BAEHR, *Auditor.*

Recorded at the request of Harry I. Mulcrevy, December 1905 in Liber 18 of Bonds, page 319.
Complaint filed June 27, 1908.

13 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Edward R. Taylor, being first duly sworn deposes and says: That he is the Mayor of the City and County of San Francisco, a municipal corporation, and plaintiff in the above entitled action, that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein alleged upon information or belief and as to those matters that he believes it to be true.

EDWARD R. TAYLOR.

Subscribed and sworn to before me this 26th day of June, 1908.

[SEAL.] MILTON M. DAVIS,
Deputy County Clerk and ex-officio
Deputy Clerk of the Superior Court.

[Title of Court and Cause.]

Demurrer.

Comes now defendant Fidelity and Deposit Company of Maryland, and demurring unto plaintiff's complaint on file herein, for ground of demurrer specifies:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

14 Wherefore, said defendant prays that plaintiff take nothing by this action, and said defendant be hence dismissed with its costs.

L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company of Maryland.

Service of the within demurrer admitted this 1st day of October, 1908.

PERCY V. LONG,
City Attorney, Attorney for Plaintiff.

Filed Oct. 1, 1908.

[Title of Court and Cause.]

The defendant Harry I. Mulcrevy demurs to the complaint herein on the ground that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore he prays the order of this Court sustaining his demurrer, and such other order and decree as may be proper.

JAS. F. TEVLIN,
Attorney for said Defendant.

Service of the foregoing demurrer admitted this 9th day of July, 1908.

PERCY V. LONG,
City Attorney, Attorney for Plaintiff.

Filed July 9, 1908.

15 [Title of Court and Cause.]

Order Overruling Demurrers.

In this case the demurrers of defendants Mulcrevy and Fidelity and Deposit Co., etc, to complaint on file herein, having been heretofore submitted to the Court for consideration and decision, and now the Court having considered and being fully advised herein:

It is ordered, that said demurrers be and the same are hereby overruled, with leave to defendants to answer complaint herein within ten (10) days.

Entered December 14, 1908.

[Title of Court and Cause.]

Answer of Defendant Harry I. Mulcrevy.

Harry I. Mulcrevy, one of the defendants in the above entitled action, answers the complaint herein and admits, denies and alleges as follows:

He denies that the provisions of the charter of the City and County of San Francisco, pleaded in paragraph VIII of the complaint refer to duties of this defendant or to moneys received by him pursuant to laws of the United States; and he alleges that the duties performed by and the moneys received by him pursuant to the laws of the United States are not subject to the provisions of the charter mentioned.

16 He denies that the sum alleged to have been collected and retained by him, or any thereof, was collected and received, or either, to or for the use and benefit, or either, of plaintiff. He denies that said sum, or any thereof, is now or at any time was the property of plaintiff, or that plaintiff is entitled to immediate possession and payment, or either, of the same. He denies that the payment of said sum or any thereof, was or is an official duty of this defendant, as clerk or otherwise by virtue of the provisions of the charter referred to or by virtue of any duty or obligation, or at all.

Further answering, and as a separate defense herein, this defendant alleges: That by act of Congress of the United States, referred to in the complaint, which said act is and at all times mentioned in the complaint was in full force and effect, it is provided as follows: that jurisdiction to naturalize aliens as citizens of the United States is conferred upon all courts of record in any state having a seal, a clerk and jurisdiction in actions at law or equity, in which the amount in controversy is unlimited; that the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect and receive and account for the following fees in each proceeding: for receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing

17 and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

That the clerk of any court exercising jurisdiction in naturalization cases is authorized to retain one half of the fees collected by him; and is required to account for the other half to the bureau of Immigration and Naturalization, provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States is entitled. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay

all additional clerical force that may be required in performing the duties imposed by the act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United
18 States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if, in the opinion of the said Secretary the business of such clerk warrants such allowance.

That this defendant was and is entitled to retain for his own use and benefit one half of the fees collected by him pursuant to said statute; and that the amount sued for herein is the one-half of said fees which this defendant has retained as authorized so to do in and by said statute.

That said plaintiff is not entitled to said fees, or to any thereof; and that said fees at all times have been, and now are the property of this defendant.

JAS. F. TEVLIN,
Attorney for said Defendant.

Duly verified.
Service admitted Feb. 2, 1909.

PERCY V. LONG,
City Attorney, Attorney for Plaintiff.

Answer filed Feb. 2, 1909.

[Title of Court and Cause.]

Answer of Defendant Fidelity and Deposit Company of Maryland.

Comes now Fidelity and Deposit Company of Maryland, one of the defendants in the above entitled action, and answering
19 unto plaintiff's complaint on file herein, admits, denies and alleges as follows:

Said defendant denies that the provisions of the charter of plaintiff, City and County of San Francisco, which are pleaded in paragraph VIII of plaintiff's complaint refer to the official duties of defendant Mulcrevy or to moneys collected by him pursuant to the laws of the United States of America, and defendant Fidelity and Deposit Company of Maryland alleges that the official duties of said Mulcrevy and moneys received by him pursuant to the laws of the United States of America are not subject to the provisions of plaintiff's charter.

Defendant Fidelity and Deposit Company of Maryland denies that the sum of two thousand nine hundred and seventy-two dollars ($2972), or any sum, collected and retained or collected or retained by said Mulcrevy as fees as specified in plaintiff's complaint was collected and received, or was collected or was received by said Mulcrevy to and for or to or for the use and benefit, or either thereof, of the plaintiff. Defendant denies that said sum or any sum is now

or any time has been the property of said plaintiff; and defendant denies that plaintiff is entitled to the immediate possession and payment, or either thereof, of the same. Defendant denies that the payment of the aforesaid sum, or any sum, into the treasury
20 of plaintiff was or is an official or any duty which was or is imposed upon and required or imposed upon or required of said Mulcrevy as clerk or otherwise by virtue of the provisions of the charter specified in said complaint, or by virtue of any duty or obligation, or at all.

Further answering unto said complaint and as a separate defense thereto defendant Fidelity and Deposit Company of Maryland alleges that by the Act of Congress of the United States of America referred to in the complaint herein, which said Act at all the times mentioned in the complaint has been and now is in full force and effect, it was provided as follows:

"SEC. 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

"United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

21 "SEC. 13. That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

"For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

"For making, filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

"The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Commerce and Labor, who shall thereupon deposit them in the treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and other Departments, and the said
22 disbursing clerk shall be held responsible under his bond for said fees so received.

"In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the Court a sum of money sufficient to cover the expenses of subpœnaing and paying the legal fees of any witnesses for whom he may request a subpœna, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturali-
23 zation proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance."

That the Superior Court of the State of California, in and for the City and County of San Francisco at all of said times was and now is a court of record of the State of California, and at all of said times had and now has a seal and a clerk, and at all of said times said Superior Court had and now has jurisdiction in actions both at law and in equity, in which the amount in controversy is unlimited.

That pursuant to the aforesaid Act of Congress it was the duty of said Mulcrevy to account for one half of the fees so collected and to pay over said one-half of said fees to the Bureau of Immigration and Naturalization of the United States of America; that pursuant to the provisions of said statute defendant Mulcrevy did account for and pay over said one-half of said fees to the aforesaid Bureau of Immigration and Naturalization.

That defendant Mulcrevy was and is entitled to retain
24 for his own use and benefit one-half of the fees collected by him pursuant to said statute; that said fees which said Mulcrevy was and is entitled to retain for his own use and benefit pursuant to the provisions of the aforesaid statute are the same fees which are claimed in this action by the plaintiff; that said plaintiff is not entitled to said fees nor to any portion thereof; that said fees at all times have been and now are the property of said Mulcrevy and he is entitled to the use and possession of the same.

Wherefore, defendant Fidelity and Deposit Company of Mary-

land prays that plaintiff take nothing by this action and that said defendant be hence dismissed with its costs.

L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company of Maryland.

Duly verified.

Service of within answer admitted this 18th day of January 1909.

PERCY V. LONG,
City Attorney.

Answer filed Jany. 18, 1909.

[Title of Court and Cause.]

Judgment.

The above entitled cause came on before this Court on the 19th day of February, 1909, upon the motion of plaintiff that judgment be entered against the defendants and in favor of plaintiff upon the pleadings, notice of which motion having been duly and regularly served upon said defendants and each of said defendants. Percy V. Long, Esq., City Attorney of the City and County of San Francisco appeared as Attorney for plaintiff and Jas. F. Tevlin, Esq., appeared as counsel for defendant, Harry I. Mulcrevy, and L. A. Redman, Esq., appeared as counsel for Fidelity and Deposit Company of Maryland, a corporation. Said motion was made upon the grounds stated in said notice of motion and submitted to the Court for its decision. The Court having fully considered the said matter and the said motion, and it appearing to the Court that the answers of said defendants did not present a material issue of fact in the above entitled cause nor did either of the answers of said defendants present a material issue of fact in the above entitled cause;

And it further appearing that the answers of said defendants presented solely an issue of law in the above entitled cause, and that upon said issue of law plaintiff was and is entitled to judgment as prayed for in plaintiff's complaint;

And it further appearing from the allegations contained in the answers of said defendants that plaintiff is entitled to judgment as prayed for in plaintiff's complaint and against said defendants and each of said defendants;

It is therefore ordered, adjudged and decreed as judgment herein that the plaintiff, City and County of San Francisco, a municipal corporation, have and recover of and from said defendants, Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland, a corporation, the sum of two thousand nine hundred and seventy-two dollars with interest at the rate of seven per cent per annum, to date hereof [illegible] from the following dates, to-wit: upon the [illegible] and five dollars and fifty cents ($505.50) from [illegible] to date hereof, upon

the sum of five hundred and eighty-nine dollars and fifty cents ($589.50) from March 31, 1907, to date hereof; upon the sum of six hundred and forty-seven dollars and fifty cents ($647.50) from June 30, 1907, to date hereof; upon the sum of six hundred and sixty-five dollars and fifty cents ($665.50) from September 30, 1907, to date hereof; upon the sum of five hundred and sixty-four dollars ($564) from December 31, 1907, to date hereof.

Dated: 26th day of February, 1909.

J. M. SEAWELL, *Judge.*

Recorded March 1, 1909.
Book 22 Page 351.
Filed Mar. 1, 1909.

27 [Title of Court and Cause.]

Engrossed Bill of Exceptions.

Be it remembered: That on Friday the 19th day of February, 1909, pursuant to notice thereof regularly given, plaintiff herein moved the Court for judgment as prayed for in the complaint. Said motion was made on the ground that the answers of the defendants did not present a material issue of fact, and did not deny the material statements of facts made by plaintiff in its complaint and that the only issue raised by the answers is an issue of law upon which plaintiff is entitled to the relief prayed for. In support of said motion the complaint and the answers thereto of the several defendants were read and the motion thereupon submitted.

Thereafter the Court granted said motion and ordered judgment to be entered in favor of the plaintiff and against the defendants as prayed for in the complaint. The defendants then and there excepted to the ruling of the Court; and that their said exception may be preserved and presented on appeal herein, they embody the same in this bill of exceptions.

JAS. F. TEVLIN,
Attorney for Defendant Harry I. Mulcrevy.
L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company of Maryland.

28 And now, within the time allowed by law therefor, the undersigned, the judge of said Superior Court, who heard the case, hereby settles the foregoing bill of exceptions.

Dated the 1st day of April, 1909.

J. M. SEAWELL,
Judge of the Superior Court.

Filed Apr. 1, 1909.

[Title of Court and Cause.]

Notice of Appeal.

To the Clerk of said Superior Court, to Plaintiff and to Percy V. Long, Esq., its Attorney; to Defendant, Harry I. Mulcrevy and to James F. Tevlin, His Attorney:

You and each of you will please take notice that the Fidelity and Deposit Company of Maryland, one of the defendants in the above entitled action, hereby appeals to the Supreme Court of the State of California from the judgment in said action in favor of the plaintiff therein and against the defendants therein, which said judgment was made and entered on March 1, 1909.

Yours, etc.,

L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company of Maryland.

29 Service of the foregoing notice of appeal is hereby admitted this 27th day of April, 1909.

PERCY V. LONG,
Attorney for Plaintiff.
JAS. F. TEVLIN,
Attorney for Defendant Harry I. Mulcrevy.

Filed Apr. 27, 1909.

[Title of Court and Cause.]

Notice of Appeal.

You will please take notice, that the defendant Harry I. Mulcrevy, hereby appeals to the Supreme Court of the State of California from the judgment in said action in favor of the plaintiff and against the defendants entered therein on the 1st day of March, 1909.

JAS. F. TEVLIN,
Attorney for Harry I. Mulcrevy.

To the Clerk of the said Superior Court, to Plaintiff and Percy V. Long, Esq., City Attorney; and Fidelity and Deposit Company of Maryland, and L. A. Redman, Esq., its Attorney.

Service of the foregoing notice of appeal is hereby admitted this 27th day of April, 1909.

PERCY V. LONG,
City Attorney, Atty. for Plaintiff.
L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company.

Filed April 27, 1909.

30 [Title of Court and Cause.]

Certificate and Stipulation to Transcript.

It is hereby certified and stipulated, that the foregoing copies are correct, and constitute the record on appeal herein; that undertakings on appeal in due form have been properly filed by and on behalf of the several appellants; and that this transcript may be used and shall serve as the transcript on the several appeals taken herein.

PERCY V. LONG,
City Attorney, Attorney for Plaintiff.
JAS. F. TEVLIN,
Attorney for Defendant Harry I. Mulcrevy.
L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company of Maryland.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original transcript, on file in the District Court of Appeal, of the first appellate District, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR, *Clerk.*
By I. ERB,
Deputy Clerk, San Francisco Office.

31 Due service of the within Transcript and receipt of a copy thereof are hereby admitted this 15th day of September, 1909.

PERCY V. LONG,
City Attorney, Attorney for Respondent.
L. A. REDMAN,
Attorney for Fidelity & Deposit Co. of Md.
JAS. F. TEVLIN,
Attorney for Harry I. Mulcrevy.

32 In the District Court of Appeal of the State of California, First Appellate District.

No. 836.

CITY AND COUNTY OF SAN FRANCISCO (a Municipal Corporation), Plaintiff and Respondent,

vs.

HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a Corporation), Defendants and Appellants.

Copy of Judgment of Appellate Court.

33 Civil No. 836, First Appellate District.

December 13, 1910.

CITY AND COUNTY OF SAN FRANCISCO (a Municipal Corporation), Plaintiff and Respondent,

vs.

HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants and Appellants.

(1) Public Officer—Naturalization Fees—Retention by Clerk of San Francisco Not Allowed—Construction of Charter.—The county clerk of the city and county of San Francisco is not entitled, under section 34 of article 15 of the charter, to retain for his own use the one-half of the fees in naturalization proceedings, which the clerks of courts exercising jurisdiction in such proceedings, *which the clerks of courts exercising jurisdiction in such proceedings* are permitted to retain under the act of congress of June 29, 1906, establishing a bureau of immigration and naturalization, and providing for a uniform rule for naturalization of aliens throughout the United States, but such fees belong to the city and county of San Francisco.)

34 (2) Id.—Compensation of Clerk of San Francisco—Salary—Moneys Received in Official Capacity—Payment into Treasury—Construction of Charter.—It is intended by such section that the salaries allowed by the charter to such city and county officials shall be in full of all services, and that all moneys received by them in their official capacity shall be paid into the county treasury.

(3) Id.—Id.—Surety on Official Bond—Liability for Fees—Construction.—The surety on the official bond of the clerk of the city and county of San Francisco is liable for such fees, where the bond is conditioned that the official will faithfully perform all official duty that might thereafter be imposed upon him by law, as well as existing duties.

Appeal from the Superior Court of the City and County of San Francisco, J. M. Seawell, Judge.

For Appellant Mulcrevy—Jas. F. Tevlin.
For Appellant Surety Co.—L. A. Redman.
For Respondent—Percy V. Long, John F. English.

35 This action was brought to recover of defendant, Mulcrevy, county clerk and ex-officio clerk of the superior court of the city and county of San Francisco, and his co-defendant, as surety on his official bond, the sum of $2,972.00, with interest from certain dates as *as* set forth in the complaint, on account of moneys received and collected by him in his official capacity as such clerk, in certain naturalization proceedings which occurred during his term of office. Upon motion of plaintiff, and after defendant had answered, the court ordered judgment for plaintiff upon the pleadings. This appeal is from the judgment, and raises only questions of law.

The facts are in substance as follows: Defendant Mulcrevy was at the November election in 1905, elected county clerk for the city and county of San Francisco for the term of two years commencing on the 8th day of January, 1906. After his election and on the 1st day of December, 1905, he made and filed his official
36 bond with the defendant corporation as surety, which bond was duly approved as required by law. This bond contained the provisions and condition that Mulcrevy should faithfully perform all official duties that now are or may hereafter be imposed upon or required of him by law, ordinance or the charter of the City and County of San Francisco." By his election and qualification as such clerk he became and was thereafter during his term of office ex officio clerk of the superior court of said city and county. After he had been so elected and had so given his official bond and entered upon the discharge of his duties, and on the 29th day of June, 1906, congress passed an act (34 Stat. at Large, 596) entitled: "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the Naturalization of aliens throughout the United States." Under said act exclusive jurisdiction as to naturalization is conferred upon special federal courts and upon all courts of record in any
37 state or territory having a seal, a clerk, and jurisdiction in law or equity in which the amount in controversy is unlimited. The duties of the clerks of the courts are set forth, as to taking declarations of intention to become citizens in triplicate, and as to sending duplicates to the Board of Immigration and Naturalization, the receiving of petitions up to the time of final report to the bureau, and other services detailed in said act.

The provisions of the act so far as material are as follows:

"The clerk of any court collecting such fees is hereby authorized to retain one half of the fees collected by him in each naturalization proceeding; the remaining one half of the naturalization fees in each case collected by such clerks, respectively, shall

be accounted for in their quarterly accounts which they are hereby required to render the Bureau of Immigration and Naturalization.

"Provided, That the clerks of courts exercising jurisdi-
38 tion in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to such Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received from such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of said Secretary the business of such clerk warrants such allowance."

39 After the act went into effect Mulcrevy collected $5,944.00 as clerk of the superior court in naturalization proceedings, and accounted for and paid over to the bureau of immigration and naturalization one-half thereof, as required by the act. The other one-half he kept himself, and has not paid over the same to the city and county of San Francisco, his contention being that it was intended by the act of congress as pay for his extra work and clerical hire in such naturalization proceedings, and that the fees were not received by him in his official capacity, but merely as an agent designated by the act of congress to perform certain services in naturalization proceedings.

The charter of the city and county of San Francisco under which Mulcrevy was elected, and which was in force at the time his bond was given, provides as follows: "Every bond shall contain a condi-
40 tion that the principal shall faithfully perform all official duties then or that may thereafter be imposed upon or required of him by law, ordinance or this charter, and that at the expiration of his term of office he will surrender to his successor all property, books, papers and documents that may come into his possession as such officer. (sec. 3, Art. XV.) * * * The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after receipt of the same" (sec. 34, Art. XV).

The salary of Mulcrevy as such county clerk was fixed in the charter as $4,000 per annum. He was also allowed, for the purpose of aiding him in the discharge of his official duties, a chief registrar at an annual salary of $2,400; a cashier at an annual salary of $1,800; twelve court-room clerks at an annual salary of $1,500 each;

five registry clerks at an annual salary of $1,800 each; ten
41 assistant registry clerks at an annual salary of $1,500 each; sixteen copyists at an annual salary of $1,200 each, and four clerks for the police court, at an annual salary of $1,500 each. The total salary list as so fixed and allowed for the office amounts to $58,600.00 per annum; and it would seem that it was intended to cover all services that might be required of the county clerk, and the pay of all deputies and employees that might be necessary in performing such services.

Moreover, in addition to the above salaries it is expressly provided in the charter (sec. 35, Art. XV) that when any officer, board or department shall require additional deputies, clerks, or employees, application shall be made to the mayor therefor, and upon such application the mayor shall make investigation as to the necessity for such additional assistants, and that if he find the same necessary, he may recommend the supervisors to authorize the appointment of such additional deputies, clerks or employees, and thereupon the board of supervisors, by an affirmative vote of not less than four-ten
42 members, may authorize such appointments and provide for the compensation of such appointees. (See reference to the application of this section in Harrison v. Horton, 5 Cal. App. Rep. 415.)

The charter having expressly provided a salary for the county clerk, and a salary for his many assistants, deputies and copyists, states that such salary shall be "full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after receipt of the same." (1) The money came into the hands of Mulcrevy as such clerk although the source from which it was derived and received was the amounts paid to him as fees in naturalization proceedings as prescribed and provided for in the act of Congress; and it was his duty to pay it into the treasury of the city and county. (2) Language could
43 not be more explicit. It does not admit of doubt or quibble as to its meaning. "No matter from what source derived" means all the money coming into his hands by virtue of and by reason of his being such county clerk and ex-officio clerk of the superior court. It was by reason of his election as county clerk and his taking office and giving his bond, and receiving a salary of $4,000 per annum, that he was enabled to receive the fees for naturalization proceedings in the superior court. He received them in his official capacity. He was ex-officio clerk of the superior court in which the fees were collected under the provisions of the act of Congress. The act authorized him to retain one-half the fees collected by him; but as to what he was to do with such half so retained did not concern the United States government, but was a matter solely between himself and the city and county of San Francisco. It was his duty to receive and file complaints, answers, pleadings, petitions in probate and to perform all services required of him, for which he re-
44 ceived fees. It was his duty to perform all services required of him by the laws of the state at the time he took office,

and all services that might be required of him by any subsequent law of the state enacted after his accession to office. Such fees were not his, but belonged to the city and county, he being in one sense the agent of the city and county in collecting such fees. It was equally his duty to perform services in naturalization proceedings after the passage of the law subsequently enacted by Congress, and to receive fees for such services, but the fees when so received belonged to the city and county of San Francisco. It was not for him to say that the services were performed under the authority of the United States, and not under the authority of the state. His bond contained the condition that he would faithfully perform all official duty that might thereafter be imposed upon him by law. The act of Congress was a law.

This case is the same in principle as In the Matter of
45 Dodge, 135 Cal. 512, where it was held that the county assessor was not entitled, under the charter, to retain for his own use percentages on poll taxes collected under the state law and for the benefit of the state. It was there said, after discussing the provisions of the charter invoked here: "The provisions of the freeholders' charter under consideration, requiring city and county officials to pay into the county treasury all moneys received by them in their official capacity, is more explicit if possible than the provisions of the County Government Act in the case of District Attorney Fay. It is clear that it was intended that the salaries should be in full for all official services of every kind whatever, and that the officer is not entitled to retain for himself any fees or perquisites for the performance of official duty. Such fees or perquisites, if any received, belong to the public corporate body that employed him."

The views herein expressed are in accord with the views of the supreme court of Wisconsin, as reported in Barron County v.
46 Beckwith, 124 N. W. 1030, where the same question was discussed. It was there claimed, as it is claimed here, that the official duty of the clerk did not include services in naturalization proceedings under a law subsequently enacted by Congress, but the court held otherwise, saying: "The argument is ingenious; but it seems to us that the statute was intended to cover all fees and emoluments coming to the clerk in his official capacity while holding the office upon a salary basis. We think that it cannot be successfully maintained that if, during the salary term, the legislature should increase the fee bill under the fee system as to clerks of courts, that the clerks, though on a salary basis, could retain, in addition to the salary, the extra fees provided for by legislative enactment after the salary had been fixed. * * * The courts of the state designated in the act have power to naturalize aliens, and the clerks perform services as clerks in such proceedings, and receive fees as
47 clerks for such services; and whether such fees are fixed by act of Congress or by state law, they are fees or emoluments of the office within the meaning of chapter 411, Laws of 1901."

Our attention is called to Eldridge v. Salt Lake County, 106 Pac. Rep. 939, where the supreme court of Utah held that the clerk may retain such fees under the act of Congress in question. While we

do not approve of the doctrine as laid down in the Utah case, it is sufficient to say that it can be readily distinguished from the case at bar. There the law provided that the county officers "shall be required by law to keep true and correct account of all fees collected by them, and to pay the same into the proper treasury and the officer whose duty it is to collect such fees shall be held responsible on his bond for the same." It does not appear from the opinion to have been a condition of the bond, or the duty of the clerk, to perform all official duties that may have been imposed upon him by law, nor did the statute require the clerk to pay all moneys, "no
48 matter from what source derived," into the treasury of the county.

(2) It is claimed by defendant surety company that even if defendant Mulcrevy is liable, the surety company is not, for the reason that the bond was given for the performance of official duties, and that it was not part of Mulcrevy's official duty to act in behalf of the United States and receive fees in naturalization proceedings. But the bond was conditioned that Mulcrevy would faithfully perform all official duty that might be imposed upon him by law; and the law thereafter imposed upon him the duty of performing services in naturalization proceedings. It was also his official duty to turn the money over to the treasury of the city and county of San Francisco within twenty-four hours after he received it. The liability of the surety follows.

The judgment is affirmed.

COOPER, *P. J.*

We concur:

HALL, *J.*
KERRIGAN, *J.*

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original opinion, on file in the District Court of Appeal, of the first appellate District, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk.*
By I. ERB,
Deputy Clerk San Francisco Office.

49 In the Supreme Court of the State of California.

S. F. No. 836.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff and Respondent,
vs.
HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants and Appellants.

Petition for Transfer of Cause After Judgment.

Jas. F. Tevlin, Attorney for Appellant Harry I. Mulcrevy.

Filed this — day of January, 1911.

B. GRANT TAYLOR, *Clerk*.
By —— ——, *Deputy Clerk*.

50 In the Supreme Court of the State of California.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff and Respondent,
vs.
HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants and Appellants.

Petition, After Judgment of the District Court, for Transfer of Cause.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of California:

This cause is within the jurisdiction of the Supreme Court by direct appeal. It was appealed to this Court; thereafter ordered referred to the District Court; and it has there passed to final judgment of affirmance. A transfer is respectfully asked by the appellant Harry I. Mulcrevy.

51 Grounds and Motives of the Application.

First. The question presented is of unusual importance, and widespread interest. It calls for a construction of provisions of the Naturalization Act of 1906; and the construction finally put upon these provisions will determine a claim of right asserted by clerks of state courts exercising jurisdiction in naturalization cases, and directly affect the practical operation of the federal law. The consequences attendant upon such a construction as is adopted by the District Court have engaged the serious attention of the Executive Department and evoked therefrom a strong expression, quoted in the briefs for Appellant and hereinafter set forth, as to the true intent of the statute. (Post, p. 4.) The question has already been passed upon by courts of last resort in two jurisdictions, Utah

and Wisconsin, which have arrived at diametrically opposite conclusions; and will doubtless come before other courts of like standing. On account, then, of the importance of the subject and the concern of the large class of which he is one, and a belief that the District Court has not arrived at the true construction of the Act, Appellant asks a hearing from the court of last resort of the State; the court to which his appeal was taken.

52 Secondly. The application is made, also, as a step which will put Appellant in a position to seek, if need should be, a writ of error from the Supreme Court of the United States.

Statement of the Case.

The action is brought by the City and County of San Francisco against this Appellant, as County Clerk thereof. The supposed cause of action, is alleged, in substance, as follows. This Appellant is county clerk and ex officio clerk of the Superior Court in and for said City and County, a salaried office; and his co-defendant is surety on his bond. As such officer he has performed services in connection with the naturalization of aliens, all of which were official services performed under the provisions of that certain act of Congress entitled: An Act to establish a Bureau of Immigration and Naturalization, and to provide a uniform rule for the naturalization of aliens throughout the United States. That in accordance with the provisions of this act defendant has collected fees for his services, aggregating $5,944, and has remitted one-half of them to the Bureau of Immigration and Naturalization. That the charter of Plaintiff requires that all moneys received by its officers in their official capacity, or for the performance of official duty, and all moneys coming into their hands no matter from what source derived

53 or received, shall be paid into the county treasury, and that no county salaried officer shall receive any fee for services performed by him in his official capacity, and the salaries provided shall be in full compensation for all services rendered. That, under these provisions, the one-half of the naturalization fees collected as aforesaid and not remitted to the Bureau of Immigration and Naturalization, to wit: $2,972, was received to the use and benefit of Plaintiff. But, although demand has been made, Appellant retains the same to his own use.

Demurrers, on the general ground, were interposed; and overruled with leave to answer.

Both defendants answered, denying that the charter of Plaintiff applied to acts performed, or to moneys collected, under the laws of the United States; and denying that the moneys collected in naturalization cases were received to the use or benefit of Plaintiff. The answers also pleaded the federal statute, and averred that by virtue thereof the defendant Mulcrevy was entitled to retain to his own use the moneys sued for.

Thereupon Plaintiff moved for judgment upon the pleadings, basing its motion on the ground that the answers did not present

a material issue of fact; and that the only issue raised is one of law upon which Plaintiff should be awarded the relief prayed for.

The motion was granted.

54 **The Character and Purpose of the Federal Statute, Generally; and the Provisions Quoted Which Are Here Particularly Involved.**

The act is entitled: An Act to establish a Bureau of Immigration and Naturalization, and to provide a uniform rule for the naturalization of aliens throughout the United States. (34 Stats. at Large, 596; U. S. Comp. Stats. Supp. 1909, 97, 477.) Regulations, promulgated by the Secretary of Commerce and Labor, under authority of the act (sec. 28), supplement its administrative features. (For Regulations see Van Dyne on Naturalization, Appendix.)

This act, it is said by the Supreme Court of Utah, "is the only "comprehensive law ever enacted by Congress upon the subject "of naturalization in which the entire procedure is provided, and "in which provision for the collection of fees is made, and the "manner of accounting for them provided for." (Eldredge v. Salt Lake County, 106 Pac. 939.) Under it, state courts may vacate judgments of federal courts and federal courts vacate judgments of courts of the states, for—"All are, for the purposes "of the naturalization act, federal courts, and one set of courts is not "foreign to the other." (United States v. Aakervik, 180 Fed.

55 Rep. 137, 141.) The act brings the two chief phases of alienage, which theretofore had no direct legislative bearing upon each other, to wit: admittance to the country, and thereafter admission to its citizenship, into an immediate statutory and administrative relation. The Bureau of Immigation, erected under the immigration laws, is expanded into a Bureau of Immigation and Naturalization which, it is provided, "under the direction and control of "the Secretary of Commerce and Labor, in addition to the duties "now provided by law, shall have charge of all matters concerning "the naturalization of aliens." (Sec. 1.) A registry of alien immigrants arriving in the United States, and maintained by immigration inspectors, is made to serve in identifying and determining the qualifications of these aliens when they seek admittance to citizenship (sec. 1); and the United States expressly reserves the right to appear before any court to cross-examine, produce evidence, and oppose the granting of petitions. (Sec. 11.)

To obtain the intended benefit from the records of the Bureau and from the Department of Justice, it is necessary that the Bureau shall be fully and promptly informed as to every alien who makes a declaration of intention, as to every alien who applies for naturalization, and as to every person claiming a right to have lost

56 or destroyed evidence of an asserted citizenship restored.

The persons selected by Congress to serve in this regard are clerks of courts. They are directed to act on their own motion. They are required to forward returns, make reports, furnish certified

copies of proceedings, and in other ways aid in the administration of the federal law, without direction or control whatsoever of the courts in which they officiate. The clerks looked to by the federal executive for such novel, varied and important services are clerks of specified federal courts, and of all courts of record in the states and territories having a clerk, a seal, and jurisdiction at law or equity in which the amount in controversy is unlimited. (Sec. 3.)

To give some notion of the part taken by the clerks in the operation of the statute. Declarations of intention must be made out by them on blanks furnished by the Bureau (Reg. 5-9), and duplicates thereof forwarded to the Bureau on or before the first working day of the following month. (Reg. 22.) They must also make out petitions for naturalization on blanks furnished them, and forward duplicates. (Reg. 22.) On filing a petition, notice thereof and of the hearing must be given by posting, and the Bureau informed of the date of hearing within thirty days after the posting.

57 (Sec. 5.) When a petition is granted, a duplicate of the certificate issued must, within thirty days and on the first working day of the following month, be transmitted to the Bureau. (Sec. 12.) If a petition be denied, the clerk must report, within thirty days, the name of the petitioner and the reasons for the denial. (Sec. 12; Reg. 19.) Certified copies of all such proceedings and orders as may be required of them by the Bureau, must be furnished. (Sec. 12.) When a certificate of citizenship is set aside, a certified copy of the order is to be sent to the Bureau; and if the order be not made in the court whence the certificate issued, the clerk must transmit a certified copy thereof to the court from which it issued, and the clerk of this court shall enter the same, cancel the original certificate, and notify the Bureau. (Sec. 19.) An application for lost or destroyed certificates shall be made, under oath, to the clerk, who shall see that it contains full information as to the paper claimed to have been lost or destroyed, and as to the time, place and circumstances; and this shall be forwarded to the Bureau together with such other information as the clerk may have bearing upon the merits of the application. (Reg. 19.) The Regulations call for many other observances by clerks, with a view to the convenience of the Bureau of Immigration and Naturalization and the uniformity of its routine, which will not be specially noticed.

58 The practical effect of the act is to impose a serious burden on clerks of courts in jurisdictions where much naturalization business is transacted; and in San Francisco the volume of business of this kind is large. The act, moreover, is highly penal. Severe penalties are provided for delinquencies of duty, and for violations of the several provisions. (See secs. 12, 18, 20, 21, 22.)

At stated stages of their proceedings clerks are required to collect certain fees, to wit: for receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar; for making, filing and docketing a petition for admission, and the final hearing thereof, two dollars; and for entering the final order and issuance of certificate, two dollars. In this connection, and here the source of this controversy is reached, it is provided:

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in each naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization. * * *

Provided, that the clerks of courts exercising jurisdiction
59 in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to such Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received from such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance. (Sec. 15.)

The Legal Character, and the Importance, of the Question Presented for Decision.

The subject of the Act is one as to which Congress has exclusive power under the Federal Constitution. (Art., I, sec. 8.)
60 The intent which must be sought in this case—the intent which must control the decision of the Court—is the intent of Congress. As to the scope of its intent, and the mode in all its details in which the intent shall be effectuated, Congress is the sole, sovereign, declarant. If States may decline the authority here proffered them by the United States, they must if they accept it, take it as it is offered and execute it according to its full intent and in the mode prescribed. From very necessity of the case, because they have granted to Congress all of their power to act upon and affect the subject, they are now powerless to thwart, or in any way affect the operation of what Congress has ordained. To say, in behalf of a general state law or a municipal charter, that its procedure, while different from that provided by Congress, will serve to attain the object of Congress just as well, or will not injuriously affect its attainment, is to mistake the true doctrine of exclusive power: to say that the local enactment controls is, at the best, to ignore the doctrine.

The statute and the regulations have two main features, viz.: (1) That the whole immediate subject of granting and safeguarding United States citizenship shall be under the direction and supervision of the Federal Executive; (2) That this direction and super-

vision shall be exercised by the Bureau of Immigration and
61 Naturalization upon and through clerks of courts, or through federal officers acting upon information provided, for the most part, by the clerks. The statute is an expression of an independent sovereignity providing for the accomplishment of purposes wholly its own. Clerks of courts have their warrant to act solely by virtue of its provisions, and their services are necessary to an efficient and full accomplishment of its purposes. Without qualification whatsoever these clerks are authorized to retain a portion of the statutory fees, and it is provided that out of the moneys so retained they shall pay all additional clerical assistance they may need in performing the duties imposed upon them. In a special case, a direct allowance from the Federal Government to the clerks is provided for, and is called "additional compensation."

It is evident from the statute that the claim of right asserted by Appellant is not without foundation in its terms. It is plain that the judgment could have been affirmed by the District Court only because of a construction put upon these terms. The case, therefore, presents a real federal question.

Apart from the technical federal question: Compensation provided for those who are to render services under a statute, is always a material feature of the statute. The presumption is that the
62 compensation is no more than the services to be rendered are worth, and only such as will induce a diligent performance of duty. The efficient discharge of the duties imposed by the naturalization act may necessitate the employment by a clerk of additional help; but neither states, nor local political divisions of states, are obligated to supply the needed assistance. In that the naturalization act is a measure of first importance to the nation, its construction in the important regards indicated, it is thought, should receive full consideration from this Court.

Contention of Appellant.

The position of Appellant is stated in the following propositions:

1. The act is concerned with a subject-matter over which Congress has exclusive power under the federal constitution.

2. Officers and courts aiding in administering the act are agencies of the federal government in attaining its purposes; the act prescribes their duties and establishes their rights.

3. The retaining a portion of the naturalization fees by clerks of courts is intended to remunerate them, as agents of the federal government, for services rendered; and to enable them to independently employ clerical assistance, which Congress contemplates they may require, in discharging the duties imposed upon them.

63 4. For a state, or any local, enactment to deprive these agents of the federal government of their intended remuneration, and of the fund provided for the purpose stated, would be to defeat the intent of the enactment and to contravene the exclusive power of Congress.

Authorities Bearing on the Merits of the Question.

I.

Pronouncements of the Executive Department.

Congress has committed the execution of the act to the Bureau of Immigration and Naturalization, "under the direction and control of the Secretary of Commerce and Labor." (Sec. 1.) In his annual report for the year 1907 the Honorable Secretary remarks that state courts have been tardy in assuming jurisdiction under the act, and he says: "The chief reason for the reluctance of the "State courts to undertake the work is the insufficient compensa-"tion for the amount and nature of the work imposed by the law "upon the clerks, and the penalties for derelictions of duty. The "result is to put petitioners to serious cost and inconvenience and to "overburden the Federal courts and retard the disposal of their "other business. The remedy is plain. The fees now allowed clerks
"should be doubled and legislation should be adopted which
"will remove any doubt that such fees may be retained, as
"compensation for the additional labor and responsibility, "by those clerks of State courts who are allowed fixed salaries by "the State." (Rep. Sec. Commerce & Labor, 1907, p. 21.)

The Secretary presents, with his report, the report of the Commissioner General of Immigration, and in this is incorporated the report of the Chief of the Division of Immigration and Naturalization. The Chief of Division states that the experience of his Division for the first year of the statute, shows that the fees allowed to clerks, "in view of the extent of the duties and the penalties of neglect "imposed upon them," are too small, and that this has seriously hampered the enforcement of the statute. He continues:

To the complaints that have been made against the law as a whole upon this ground it is a sufficient reply to suggest that the fees be enlarged so as to be more nearly compensatory for the amount and character of the work imposed upon clerks of courts and the risks incurred by them.

This situation has been further accentuated by the opinions of the legal authorities of some of the states which provide a fixed annual salary for the clerks of their courts, that the naturalization fees
cannot be retained by such clerks as compensation for the
additional work required by the naturalization act, but must
be accounted for to the State. * * * Both for the public convenience of access to the means of securing citizenship and to relieve the Federal courts of the excessive burden which would interfere seriously with the prompt disposal of general litigation, it seems important to raise the scale of fees, and to declare by legislation, as is a fact, that State courts, and their clerks are when engaged in administering the naturalization law, agencies exclusively of the Federal Government, and as such amenable only to the laws of the United States. It may be conceded that the General Government has no power to impose with authority any duties upon tribunals which are the exclusive creations of the States. On the

other hand, if such tribunals, with the tacit or expressed consent of the sovereignties to which they owe their existence, assume a permissive jurisdiction granted by the General Government, their exercise of it is bound strictly by the terms of the authority, equally with Federal courts. (Id., p. 195.)

II.

Decisions of Courts.

I. Cases in which similar facts are presented.

Eldredge v. Salt Lake County, 106 Pac. 939;

66 Barron County v. Beckwith, 124 N. W. 1030.

The case first cited is not, it is thought, accorded its due weight as authority by the District Court. It is said that, while not approving of the reasoning of the opinion, the case passed upon is readily distinguishable from the case at bar on the ground of a difference between the state statute there considered and the charter of San Francisco. The supposed difference is not discoverable. The Utah statute provides, as appears from the statement of the case, that the salaries allowed county officers constitute "full compensation for all official services rendered;" and this, in legal effect, is as broad as the municipal charter. The decision of the Utah court does not turn, however, upon the phraseology of the state statute; and to distinguish that case from this for a difference between the local statutes involved implies that the real force of the reasoning of the court has been missed. The decision rests broadly on the Federal Statute and is, in effect, that in dealing with naturalization Congress is supreme, and any State Statute which would have the effect of diverting from the clerks the moneys they are authorized by Congress to retain, must fail as being in contravention of the superior law.

67 In this connection the following considerations are submitted, as supplemental to those advanced in Eldredge v. Salt Lake County.

The tenor and terms of the act show that the portion of the fees which clerks are authorized to retain are intended to be retained to their own use. It is just and politic that the United States should compensate the agents who give substantial aid in enforcing a political measure of vast importance. Fees retained by clerks of Federal courts go to their personal use; it was known to Congress that they would, and intended that they should. As all clerks are equal under the act, it is to be inferred that what is clearly intended as to some is intended as to all. Again, it is provided that clerks shall pay for whatever clerical assistance they may need out of the fees retained. Finally, the act itself in providing a further allowance to clerks when fees in excess of $6,000 are collected in any one year, calls it "additional compensation."

The clauses referring to additional clerical force and additional compensation do not seem to have arrested the attention of either the Utah or the Wisconsin court, although they call for special notice in construing the statute. It is provided that: "The Clerks of

"the various courts exercising jurisdiction in naturalization pro-
"ceedings shall pay all additional clerical force which may be
68 "required in performing the duties imposed upon clerks of
"courts from fees received by such clerks in naturalization
"proceedings. And in case the clerk of any court collects fees in
"excess of six thousand dollars in any one year, the Secretary of
"Commerce and Labor may allow to such clerk from the money
"which the United States shall receive additional compensation for
"the employment of additional clerical assistance, but for no other
"purpose, if in the opinion of said Secretary the business of such
"clerk warrants such allowance." (Under a ruling of the Comptroller of the Treasury additional compensation cannot be allowed by the Secretary of Commerce and Labor. Report Com. Gen. Im., 1907, p. 124.) The appropriation act of 1909 provides money for that purpose. (Comp. Stats. Supp. 1909, 494.) A probable need of clerical assistance by clerks of courts was contemplated by Congress and provided for. To meet this need, as well as to afford compensation to clerks themselves, the amount of fees which may be retained has been fixed, that is; the amount has been fixed with reference, first to compensating the clerks personally and, secondly, to providing them a fund for the employment of additional clerical force. The employment of additional assistance is expressly made
an affair of the clerks; they are responsible to the Bureau for
69 the work done in their offices, and they have the right to
select those who are to assist them in doing it. Moneys allowed to a clerk who has taken in more than $6,000 in a year are not deducted from the fees collected by him; they are paid directly from the treasury of the United States, and are received as additional compensation for the employment of additional clerical assistance, but for no other purpose. An allowance thus made is in no sense an emolument of the clerk's local office. It is made after investigation, out of the United States treasury, directly to the clerk for the sole express purpose of enabling him to transact the business which comes to him under the federal statute. The allowance is made on application of the clerk, and is awarded him under mandate of the act to expend it for the purpose for which it is granted.

It is no answer to the requirement and intent of the statute to say, as does the District Court, that the City and County, having appropriated the allowance, may, upon a discretionary recommendation of the mayor and an affirmative vote of not less than fourteen members of the Board of Supervisors, supply the needed assistance. That is not the case provided for by Congress. If it were established
that the City and County of San Francisco could, and would,
70 meet the actual necessity of the case, the situation would not
be altered. The question is as to the intent of Congress; as to the legal effect of the terms of an enactment passed in the exercise of an exclusive power. The terms as to additional allowances carry their meaning upon their face. The intent of Congress is one; it cannot be divided so as to be given one effect as to moneys allowed, and another as to moneys retained. Moneys allowed go to the clerk

to be by him expended for their proper purpose; it follows that moneys retained are retained by him for the uses provided.

The clerks of State courts act by virtue of an authority derived from a source external to the State and independent of it. Because of its source, then, this authority cannot be appurtenant to the local office. One may have an official capacity by the fact that he holds an office; or because of the fact that he is lawfully authorized to act in behalf of an office, whereby his acts so done have an official character. "A person may act in an official capacity because he is "an officer lawfully appointed and qualified, and acts as such; or he "may act in an official capacity because he lawfully performs duties "which are of an official character." (United States v. Van Leuven, 62 Fed. 62, 66; 29 Cyc. 1472.) Acts done under direction of the government which establishes an office and defines its powers
71 and duties, are official in the first sense. Appellant has his office under the State; but no powers or duties as to naturalization are defined for him. By a law of an external and independent government, authority in this regard is conferred; but he is not an officer of that government. So, when acting in naturalization proceedings he does not exercise the authority of his government; on the contrary, he acts under authority of a government which, as an officer of the City and County of San Francisco, is not his government. He does not, therefore, act in an official capacity as to either government in the first sense of the phrase as above defined.

The legal position of Appellant as to his official capacity, is analogous to that of the defendants in United States v. Van Leuven, cited above. He lawfully performs duties in behalf of the Bureau of Immigration and Naturalization of the Department of Commerce and Labor, which is an office of the United States; he represents that office; and his services are in aid of the official duties committed to it. Although he holds no federal office, his duties have an official character, and so he acts in an official capacity in the second sense of the phrase. In this meaning, however, his capacity is not appurtenant, or even incidental, to his local office; the term has reference to the office to which the subject of his action has been com-
72 mitted, in which the authority by virtue of which he acts is lodged, and which is aided by his services. When acting in naturalization matters, therefore, Appellant is related by official capacity to the Department of Commerce and Labor.

The proposition here considered may be put as the conclusion of a syllogism, viz.: Who represents another by his authority, in dealings with third parties, is an agent of that other; but state courts and clerks of courts, when acting under the naturalization act represent the United States in their dealings with aliens; therefore, state courts and clerks of courts, when acting under the Naturalization Act, are agents of the United States. Congress has freely selected state courts and their clerks to act in its behalf, has conferred upon them sufficient of its authority to serve its intended purpose, and has directed how the authority shall be used. The authority is conferred in behalf of the granting source, and is employed under its direction, so that the user represents the source in dealing with

third parties. A State, by requiring or not forbidding its courts and their clerks to act, does not thereby become a party to the relation. The relation is established by the act, and obtains strictly between the United States on the one side, and the courts and clerks of courts on the other.

73 2. Cases arising under the act, and bearing directly upon its construction.

State of Washington v. Libby, 92 Pac. 350;
United States v. Aakervik, 180 Fed. 137;
Ex parte Dolla, 177 Fed. 101.

3. Cases not arising under the act, but having a bearing upon its construction.

To the point that state courts, when acting in naturalization proceedings, exercise a delegated power.

Levin v. United States, 128 Fed. 826;
Robertson v. Baldwin, 165 U. S. 275.

To the point that state courts, when acting in naturalization matters are agencies of the Federal Government.

Matter of Christern, 43 N. Y. Sup. Ct. 535;
People v. Sweetman, 3 Parker's Cr. Rep. (N. Y.) 358;
In re Ramsden, 13 How. Pr. 429.

To the point that clerks of courts do not act in their official capacity under the naturalization act.

United States v. Hill, 120 U. S. 169, 30 Law. Ed. 627;
Hill v. United States, 40 Fed. 441;
United States v. McMillan, 165 U. S. 506.

74 The Decision in the Matter of Dodge Is Not Authority in This Case.

The District Court says: "This case is the same in principle as "In the Matter of Dodge." But: the Dodge case was concerned with the city charter and a State Law. This case is concerned with the city charter and an Act of Congress. The Dodge case does not touch upon the point to be decided here; because that point was not involved. The point there decided is: that as between a general state law and the municipal charter, the latter, under the State constitution from which both enactments derive their authority, controls the subject of compensation of county officers. The enactment on which Appellant bases his claim of right was passed, in the exercise of a supreme power, by a legislature external to and independent of the State of California. To say that the Dodge case and the case at bar are the same in principle shows, it is respectfully submitted, a misapprehension of the true legal bearings of the point to be decided. In its relation to the present controversy the Dodge case is in direct analogy with Finley v. Territory, commented on in Eldredge v. Salt Lake County, supra; where its utter lack of bearing upon the principle involved is convincingly shown.

75 A Final Comment on the Opinion of the District Court.

The contention of Appellant involving broad principles and doctrines of law, which counsel has made some attempt to bring out in the briefs, is disposed of in two sentences, viz: "The money came "into the hands of Mulcrevy as such clerk although the source from "which it was derived and received was the amounts paid to him "as fees in naturalization proceedings as provided and prescribed in "the act of Congress; and it was his duty to pay it into the treasury "of the city and county." And: "The act authorized him to retain "one-half of the fees collected by him; but as to what he was to do "with such half did not concern the United States Government, but "was a matter wholly between himself and the city and county of "San Francisco."

These are assertions, merely; broad assumptions of the very point to be decided.

Conclusion.

It is submitted that the legal merits of the case have not been passed upon, nor due consideration accorded to the weighty authorities advanced for Appellant; and that a question of such importance as is here presented, which has been given contradictory answers by the courts of last report to which it has thus far been submitted and which will, in all probability come before the Supreme
76 Court of the United States for final adjudication, should be accorded a full hearing by this Court.

JAS. F. TEVLIN,
Attorney for Appellant, Harry I. Mulcrevy.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original petition for transfer of cause after judgment in the District Court of Appeal, for the First Appellate District as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR, *Clerk.*
By I. ERB, *Deputy Clerk.*
San Francisco Office.

77 Due service and receipt of a copy of the within is hereby admitted this — day of January, 1911.

———, ———,
Attorneys for Respondent.

78 In the Supreme Court of the State of California.

1 Civ. 836. S. F. 5354.

CITY AND COUNTY OF SAN FRANCISCO
vs.
MULCREVEY.

By the COURT:

The petition to have the above entitled cause heard and determined by this Court after Judgment in the District Court of Appeal for the First Appellate District is denied.

Dated this 9th day of February, 1911. BEATTY, *C. J.*

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a hearing denied by Supreme Court, after Judgment in the District Court of Appeal for the first appellate District as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR, *Clerk.*
By I. ERB, *Deputy Clerk,*
San Francisco Office.

79 [Endorsed:] 1 Civ. S. F. 5354. In the Supreme Court of the State of California. City and County of San Francisco vs. Mulcrevey. Order Denying Petition for Re-hearing.

80 In the Supreme Court of the State of California.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff,
vs.
HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants.

To the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California:

The petition of Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland, respectfully shows:

That heretofore, to-wit, on the 28th day of June, 1908, the City and County of San Francisco, a municipal corporation, commenced its action in the Superior Court of the State of California, in and for the City and County of San Francisco, against your petitioners, as defendants. The complaint in said action alleges, in substance and effect, as follows: that the plaintiff is, and at all times mentioned herein was, a municipal corporation organized and incorporated as

such under the laws of the State of California, and governed by a charter enacted, adopted and approved, according to law; that your petitioner Mulcrevy is, and at all times mentioned was, county clerk of said city and county and ex officio clerk of the said Superior Court, and that your petitioner Fidelity and Deposit Company of Maryland is, and was, the surety on his official bond; that said Mulcrevy, as county clerk and ex officio clerk of the said Superior Court, performed services in the naturalization of aliens under the laws of the United States, and in this connection the allegations of the complaint are in words and figures as follows, that is: "the said Harry I. Mulcrevy, as such County Clerk and ex officio Clerk of the
81 Superior Court of the City and County of San Francisco and as a part of his official duties, received and filed the declaration of sundry aliens of their intention to become citizens of the United States and issued duplicates of such declarations; and said Harry I. Mulcrevy, as such clerk as aforesaid, and as a part of his official duties, also made, filed and docketed the petitions of sundry aliens for admission as citizens of the United States, and entered final orders on sundry of said petitions and issued sundry certificates of citizenship thereunder. All of the aforesaid services were rendered and performed by the said defendant, Harry I. Mulcrevy, as such clerk as aforesaid, under and in accordance with the provisions of that certain Act of Congress, approved June 29, 1906, entitled "An Act to Establish a Bureau of Information and Naturalization and to provide a uniform rule for the naturalization of aliens throughout the United States. Under and in accordance with the provisions of the aforesaid Act of Congress the said defendant Harry I. Mulcrevy, as such clerk as aforesaid, was entitled to receive and collect, from the persons for whom services were rendered, as aforesaid, and as fees for the performance of the aforementioned official services, the total sum of fifty-nine hundred and forty-four (5,944) dollars."

It is further, in substance, alleged in said complaint that the said Mulcrevy has retained to his own use one-half of the aforesaid fees, amounting to $2,972; that the charter of said City and County provides that all moneys which may be collected or received by any officer of said city and county in his official capacity, or for the performance of his official duty, shall be paid by such officer into the treasury of said city and county; that no salaried officer shall receive or accept any fee, payment or compensation directly or indirectly for any services performed by him in his official capacity; that the salaries provided in said charter shall be in full compensation for all services rendered, and that every officer shall pay all moneys coming into his hands as such officer, no matter from what
82 source derived or received, into the treasury of said City and County within twenty-four hours after receiving the same.

It is further alleged, that the said Mulcrevy was a salaried officer, whose salary was fixed by the charter of said City and County; that under the aforesaid provisions of the charter the sum of $2,972, collected and retained by him so as aforesaid, was collected and received to and for the use and benefit of said City and County, and

payment thereof into the county treasury is his official duty, but although demand has been made he has not paid over the same, nor any part thereof, and retains the whole thereof to his own use.

The Act of Congress mentioned and referred to in the complaint provides as follows, to-wit:

"SEC. 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts: United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk and jurisdiction in actions at law or equity, or law and equity, in which the amount of controversy is unlimited.

"SEC. 13. That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect and account for the following fees in each proceeding: For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars. The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceedings; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts which they are hereby required to render the Bureau of Naturalization and Immigration, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Commerce and Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor of the State and other Departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received. In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court, a sum of money sufficient to cover the expenses of subpœnaing and paying the legal fees of any witness for whom he may request a subpœna, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: Provided that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceed-

ings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance."

To the complaint each of the defendants demurred, severally, on the ground that the same did not state facts sufficient to constitute a cause of action. The demurrers were orally argued and thereupon ordered submitted upon briefs. On the oral argument and in the briefs made and submitted in support of the demurrers, it was contended in behalf of defendants that under the provisions of the act of Congress mentioned in the complaint that half of the fees collected by the clerk of the court in proceedings had under said enactment which said clerk is authorized to retain, are properly retained by him to his own use, and that he has a right under said enactment to so retain the same; and that he retains them to his own use by virtue of the authority exercised under the enactment above mentioned.

The demurrers were overruled, with leave to answer; and thereafter, and within due time, the defendants answered, denying that the provisions or any of the provisions of the charter of plaintiff applied to the acts performed by the defendant Mulcrevy, or to the moneys collected by him, under and by virtue of the au-
84 thority of a statute of the United States. The answer also, as and for a further and separate defense, expressly pleaded the Act of Congress above mentioned, set up the several provisions thereof bearing upon the question of the right of said Mulcrevy to retain to his own use the moneys here sought to be recovered from him, that is, the provisions of said Act which are hereinbefore set out, and alleged that by virtue of these provisions and under and by virtue of the statute of the United States in which they are contained, said Mulcrevy was, and is, authorized and entitled to retain for his own use and benefit the moneys sued for, and that the plaintiff is not entitled thereto, or to any thereof.

Thereupon plaintiff moved for judgment upon the pleadings, that is, upon its said complaint and the said answers thereto, basing its motion on the ground that the answers do not present a material issue of fact; and that the only issue between the parties raised by the answers is one of law upon which the plaintiff should be awarded the relief prayed for. The said motion was heard by the Court on the 26th day of February, 1909, granted, and judgment was

thereupon, on said last named day, rendered and entered, in favor of plaintiff and against the defendants as prayed for in the complaint. The judgment recites that it is given upon the motion above mentioned and on the ground that the answers do not present a material issue of fact, and present solely the issue of law upon which plaintiff is entitled to judgment.

Thereupon, and within the time allowed therefor by law, that is to say, on the 27th day of April, 1910, the defendants appealed the cause to the Supreme Court of the State of California, and said Court on the 10th day of June, 1910, and under and by virtue of Article VI, section 4, of the Constitution of California, made its order that the cause be heard and determined by the District Court of Appeal of the State of California, for the First Appellate
85 District, and the cause was by said last mentioned court heard and determined, and the judgment therein was affirmed and a judgment of affirmance pronounced, on the 13th day of December, 1910, and under the Constitution of California the said judgment of affirmance of said District Court of Appeal became final on the 12th day of January, 1911. It was held and decided by said District Court of Appeal that the moneys sued for came into the hands of the defendant Mulcrevy as clerk of the Superior Court in and for the City and County of San Francisco, "although," as it is stated in the decision of said Court, "the source from which it was derived and received was the amounts paid to him as fees in naturalization proceedings as prescribed and provided for in the Act of Congress; and it was his duty to pay it into the treasury of the city and county." And it was further held, that "He (Mulcrevy) was ex officio clerk of the superior court in which the fees were collected under the provisions of the Act of Congress. The Act authorized him to retain one-half the fees collected by *him*; but as to what he was to do with such half so retained did not concern the United States government, but was a matter solely between himself and the city and county of San Francisco."

Thereafter, within the time and in manner prescribed by law, to-wit, on the 20th day of January, 1911, the defendants duly petitioned the Supreme Court of California, to which the appeal in said cause had been taken and in which the record was, to hear and determine the cause. This petition was on the 9th day of February, 1911, denied, whereby the judgment in said cause became and was final.

That a federal question is raised in this case, and a decision thereof is necessary to, and necessarily involved in, the judgment given herein; and that said judgment is in conflict with the statute of the United States hereinbefore mentioned and denies to the defendants their rights under said statute.
86 That said Supreme Court is the highest court of the State of California in which a decision of this cause could be had.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of California, to the end that the record in said

cause may be advanced into the Supreme Court of the United States, and the errors herein complained of may be examined and corrected, and said judgment reversed; and that your petitioners may have such other and further relief as may be just; and your petitioners will ever pray.

H. I. MULCREVY,
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By JEWEL ALEXANDER, *Attorney in Fact*,
GUY LE ROY STEVICK, *Agent*,
Petitioners.

SAMUEL M. SHORTRIDGE,
JAS. TEVLIN,
I. A. REDMAN,
Attorneys for Petitioners.

87 STATE OF CALIFORNIA,
City and County of San Francisco, ss.

Harry I. Mulcrevy, being first duly sworn, deposes and says: I am one of the petitioners in the foregoing Petition. The said Petition is true of my own knowledge, except as to those matters which are therein stated according to information or belief, and as to those matters I believe it to be true.

H. I. MULCREVY.

Subscribed and sworn to before me this 8th day of August, 1911.
[SEAL.] J. J. KERRIGAN,
Notary Public in and for the City and County of San Francisco, State of California.

Let the writ of error prayed for in the foregoing Petition issue upon the execution of a bond by said Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland to the City and County of San Francisco, in the sum of Five Thousand ($5,000) Dollars, said bond when approved to act as a supersedeas.

Dated: August 10th, 1911.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an Original petition for Writ of Error, now on file in this office, in the above entitled cause, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk*,
By I. ERB,
Deputy Clerk, San Francisco Office.

88 [Endorsed:] Copy. No. 5354. Dept. No. —. Supreme Court State of California. City and County of San Francisco, Plaintiff, vs. H. I. Mulcrevy et al., Defendants. Petition for Writ or Error. Filed Sept. 11, 1911. B. Grant Taylor, Clerk. By Erb, Deputy. L. A. Redman, James F. Tevlin, and Samuel M. Shortridge, Attorneys for Petitioners, Chronicle Building, San Francisco, Cal.

89 In the Supreme Court of the State of California.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff,
vs.
HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendants.

The defendants in the above entitled action, in connection with their petition for a writ of error, respectfully submit and make the following assignments of errors appearing in the final order and judgment herein, as follows, to-wit:

First. The Court erred in construing the Act of Congress entitled "An Act to establish a bureau of immigration and naturalization and to provide a uniform rule for the naturalization of aliens", approved June 29, 1906, in that it erroneously held that of the fees which by said Act the defendant Mulcrevy, as Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, is required to collect for his services in naturalization matters, the half thereof which he is by said Act authorized to retain is retained to the use and benefit of the City and County of San Francisco.

Second. The Court erred in holding that the provisions of the charter of the City and County of San Francisco apply to fees collected under authority of the Act of Congress above mentioned, and particularly to the one-half thereof which he the said Mulcrevy, as such Clerk, is thereby authorized to retain.

Third. That the interpretation put upon the provisions of the charter of the City and County of San Francisco by said Court is contrary to and in violation and contravention of the said
90 Act of Congress as to the use and disposal of the one-half of the fees above referred to, which said Mulcrevy is authorized to retain.

Fourth. That the judgment of the said Court denies to said Mulcrevy a right accorded him by the Act of Congress above mentioned, to-wit: his right to retain to his own use the one-half of the fees which he is by said Act authorized to retain.

For which errors the said defendants pray that the judgment of the said Supreme Court of the State of California, in the above entitled cause, be reversed, and a judgment entered for these defendants.

SAMUEL M. SHORTRIDGE,
JAS. F. TEVLIN,
Attorneys for Defendant Harry I. Mulcrevy.
L. A. REDMAN,
Attorney for Defendant Fidelity and Deposit Company of Maryland.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original assignment of errors, now on file in this office, in the above entitled cause, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk*,
By I. ERB,
Deputy Clerk, San Francisco Office.

91 [Endorsed:] Copy. Supreme Court State of California. City and County of San Francisco, Plaintiff, vs. Harry I. Mulcrevy, et al., Defendants. Assignment of Errors. Filed Sep. 11, 1911. B. Grant Taylor, Clerk, By Erb, Deputy. L. A. Redman, James F. Tevlin, and Samuel M. Shortridge, Attorneys for Defendants.

92 In the Supreme Court of the State of California.

HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Plaintiffs in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, Defendant in Error.

Know all men by these presents: That we, Harry I. Mulcrevy, as principal, and Henry H. Davis and James C. Nealon, as sureties, are held and firmly bound unto the City and County of San Francisco in the sum of five thousand dollars, to be paid to the said obligee, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of October, 1911.

Whereas, the above-named Harry I. Mulcrevy has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered and pronounced in the above-entitled action by the Supreme Court of the State of California:

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error Harry I. Mulcrevy shall prosecute his writ of error to effect, and answer all damages and costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

HARRY I. MULCREVY.
J. C. NEALON.
HENRY H. DAVIS.

93 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Henry H. Davis and James C. Nealon, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says: that he — one of the sureties named in the above undertaking; that he is a resident, freeholder and householder in said City and County, and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. C. NEALON.
HENRY H. DAVIS.

Subscribed and sworn to this 26th day of October, A. D. 1911.

J. C. WELCH.
Deputy County Clerk and ex-Officio Deputy Clerk of the Superior Court in and for the City and County of San Francisco, State of California.

The above bond is hereby approved this 28th day of October, 1911.

C. H. BEATTY.
Chief Justice of the Supreme Court of the State of California.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original bond, now on file in this office, in the above entitled cause, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 20th day of November, A. D. 1911.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk*,
By I. ERB,
Deputy Clerk, San Francisco Office.

94 [Endorsed:] Copy. Supreme Court, State of California. Harry I. Mulcrevy, et al., Plaintiffs in Error, vs. City and County of San Francisco, Defendant in Error. Bond. Filed Oct. 31, 1911. B. Grant Taylor, Clerk. By Erb, Deputy. James F. Tevlin and Samuel M. Shortridge, Attorney for Defendant Harry I. Mulcrevy, Chronicle Building, San Francisco, Cal.

95 In the Supreme Court of the State of California.

HARRY I. MULCREVY and FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a Corporation), Plaintiffs in Error,
vs.
CITY AND COUNTY OF SAN FRANCISCO (a Municipal Corporation), Defendant in Error.

Know all men by these presents that we, Fidelity and Deposit Company of Maryland, a corporation as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the City and County of San Francisco, a Municipal Corporation, defendant in error above named, in the sum of five thousand dollars ($5,000) to be paid to the said obligee for the payment of which well and truly to be made, we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this twenty-fourth day of October A. D. 1911.

Whereas the said Fidelity and Deposit Company of Maryland has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered and pronounced in the above entitled action by the Supreme Court of the State of California;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error Fidelity and Deposit Company of Maryland shall prosecute its writ of error to effect, and answer all costs and damages that may — adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By GUY LEROY STEVICK,
Attorney in Fact.

Attest:
JAMES W. MOYLES, *Agent.*

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.
BRANTLEY W. DOBBINS,
Resident Vice President.

Attest:
HAROLD M. PARSONS,
Resident Assistant Secretary.

96 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this twenty-fourth day of October in the year One Thousand Nine Hundred and Eleven, before me John J. Cordy a notary public in and for the City and County of San Francisco, State aforesaid, residing therein, duly commissioned and sworn, personally appeared

Brantley W. Dobbins and Harold M. Parsons known to me to be the resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York, the corporation described in and which executed the foregoing instrument as surety, and known to me to be the persons who executed the said instrument on behalf of the said American Surety Company of New York and they both duly acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco the day and year in this certificate first above written.

[SEAL.] JOHN J. CORDY,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 23rd, 1915.

The above bond is hereby approved this 28th day of October, 1911.

C. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original bond, now on file in this office, in the above entitled cause, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 29th day of November, A. D. 1911.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk.*
By I. ERB,
Deputy Clerk, San Francisco Office.

97 [Endorsed:] Copy. Supreme Court, State of California. Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland, Plaintiffs in Error, vs. City and County of San Francisco, Defendant in Error. Bond. Filed Oct. 31, 1911. B. Grant Taylor, Clerk. By Erb, Deputy. L. A. Redman, Attorney for Plaintiff Fidelity & Deposit Company, Chronicle Building, San Francisco, Cal.

98 UNITED STATES OF AMERICA, *ss:*

To City and County of San Francisco, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 29th day of December A. D. 1911 pursuant to a writ of error from the Supreme Court of the United States filed in the office of the clerk of the Supreme

Court of the State of California, wherein Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland are plaintiffs in error and you are Defendant in error, to show cause, if any there be, why the judgment against the plaintiffs in error as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California this 31st day of October A. D. 1911, and of the Independence of the United States, the one hundred and thirty-sixth.

W. H. BEATTY.
Chief Justice of the Supreme Court of the State of California.

Attest:

[Seal Supreme Court of California.]

B. GRANT TAYLOR.
Clerk of the Supreme Court of the State of California.

99 Service of within Citation, by copy, admitted this 3rd day of November A. D. 1911.

PERCY V. LONG,
City Attorney, City & County of San Francisco, Attorney for Defendant in Error.

[Endorsed:] S. F. 5354. In the Supreme Court of the United States. Harry I. Mulcrevy, et al., Plaintiffs in Error, vs. City and County of San Francisco, Defendant in Error. Citation. Filed Nov. 15, 1911. B. Grant Taylor, Clerk. By Erb, Deputy.

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland and City and County of San Francisco, a municipal corporation, a manifest error hath happened, to the great damage of the said Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on December 29th, 1911,

in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid *be* inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Edward D. White, Chief Justice of the
101 United States, this 31st day of October, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and *twenty*-sixth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. District Court, Northern District of California.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

102 [Endorsed:] No. 5354. In the Supreme Court of the United States. Harry I. Mulcrevy, et al., Plaintiffs in Error, vs. City and County of San Francisco, Defendant in Error. Writ of Error. Filed Oct. 31, 1911. B. Grant Taylor, Clerk. By Erb, Deputy. Samuel M. Shortridge, Attorney at Law, Chronicle Building, San Francisco, Cal.

103 Supreme Court of California, Clerk's Office, Wells Fargo Bldg., San Francisco.

B. Grant Taylor, Clerk, Wm. R. Mackrille, Chief Deputy.

UNITED STATES OF AMERICA,
Supreme Court of California, ss:

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, in obedience to the command of the within Writ of Error, do hereby send to the Supreme Court of the United States, a duly certified transcript of the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name, and affix the seal of said Court, in the City of San Francisco, California, this 24th day of November, A. D. 1911.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

Endorsed on cover: File No. 22,948. California Supreme Court. Term No. 133. Harry I. Mulcrevy and Fidelity and Deposit Company of Maryland, plaintiffs in error, vs. City and County of San Francisco. Filed December 1st, 1911. File No. 22,948.

(Recorded)

BRIEF FOR PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 483.

HARRY I. MULCREVY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFFS IN ERROR,

vs.

CITY AND COUNTY OF SAN FRANCISCO.

SAMUEL M. SHORTRIDGE,
Counsel for Harry I. Mulcrevy.

W. A. LANGHAM,
Counsel for Fidelity and Deposit Company of Maryland.

JAMES M. TEVLIN,
Counsel.

(22948)

Supreme Court of the United States

OCTOBER TERM, 1913

No. 133.

HARRY I. MULCREVY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFFS IN ERORR,

vs.

CITY AND COUNTY OF SAN FRANCISCO.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

This action was brought in the Superior Court of the State of California, in and for the City and County of San Francisco, against Harry I. Mulcrevy, county clerk of said city and county and ex-officio clerk of the court above mentioned, and Fidelity and Deposit Company of Maryland, the surety on his official bond. The purpose of the action is to recover to the City and County of San Francisco one-half of the statutory fees collected by said Mulcrevy in proceedings had under the naturalization act of June 29, 1906. (34 Stats. 596; 36 Stats. 829.)

The act confers exclusive jurisdiction to naturalize aliens as citizens of the United States upon the

United States circuit and district courts, the district courts for the territories, the Supreme Court of the District of Columbia, and all courts of record in any state or territory, having a seal, a clerk and jurisdiction in all actions in which the amount in controversy is unlimited. The provisions as to fees, as they were at the time this action was commenced (the italics being ours), are as follows:

> "Sec. 13. That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect and account for the following fees in each proceeding: For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.
>
> "The clerk of any court collecting such fees is hereby *authorized to retain* one-half of the fees collected by him in such naturalization proceedings; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization. . . . Provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be *permitted to retain* one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in ex-

cess of such amount shall be accounted for and paid over to such Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The *clerks of the various courts* exercising jurisdiction in naturalization proceedings *shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings.* And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive *additional compensation* for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance."

The Superior Court of the State of California is a court of record of the class defined in Section 3 of the act. The State Constitution, and the Code of Civil Procedure, provide that said court "shall have the power of naturalization and to issue papers therefor". (Const. art. 6, sec. 5; C. C. P. sec. 76.) Until 1907, no fee or compensation could be lawfully charged in naturalization cases in the State courts. (Stats. 1871-72, 80; Stats. 1895, 267; Stats. 1897, 452, sec. 227.) At the first session of the State Legislature after the passage of the federal law, the prohibition against naturalization fees was dropped from the statutes. Since then, excepting the provisions of the constitution and the code above mentioned, there has been no

local enactment of any sort affecting naturalization, unless certain clauses of the San Francisco charter control the disposition of the fees which the clerk of the Superior Court is authorized to collect under the act of Congress.

The City and County of San Francisco is a municipal corporation made up of a consolidated city and county, and the State Constitution provides that the charter of a consolidated city and county government may fix the compensation of the county officers. (Const. art. 11, sec. 8½.) The San Francisco charter provides an annual salary for the county clerk. At the times mentioned in the complaint herein plaintiff in error Mulcrevy was county clerk of the City and County of San Francisco, and ex-officio clerk of the said Superior Court, and Fidelity and Deposit Company of Maryland was the surety on his official bond.

The provisions of the charter which are claimed by defendant in error to have a bearing upon the case, are as follows:

> "Salaried officers shall not accept nor receive any fee, payment, or compensation, directly or indirectly, for any services performed by them in their official capacity * * * whether performed during or after official business hours." (Art. 3, ch. 3, sec. 2.)
>
> "Every fee, commission, percentage, allowance or other compensation, authorized by law to be charged, received, or collected by any officer for any official service, must be paid by the officer receiving the same to the treasurer in the manner herein provided." (Art. 3, ch. 3, sec. 3.)

"The salaries provided in this chapter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the City and County within twenty-four hours after receipt of the same." (Art. 16, sec. 34.)

The cause of action alleged in the complaint herein rests on the provisions of the charter above quoted. In substance it is: that Mulcrevy, as clerk of the Superior Court, performed services under the act of Congress; collected the statutory fees, and retains one-half thereof, amounting to $2972, to his own use; and that under said provisions of the charter, which are pleaded in substance, these moneys were received to and for the use and benefit of the City and County of San Francisco. It also appears from the complaint, that the official bond of Mulcrevy is conditioned for the faithful performance of all official duties that are, or may be imposed or required of him by law, ordinance or the charter of said city and county. (Rec. fols. 1-11.)

Plaintiffs in error demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. The demurrers were overruled, with leave to answer. (Rec. fols. 13-15.) Answers were filed, denying the averments that the provisions of the charter apply to acts done, or to moneys received by the clerk of the Superior Court, under the laws of the United States. The act of Congress is set up, and it is averred that by virtue thereof

plaintiff in error Mulcrevy is entitled to retain to his own use the moneys sued for. (Rec. fols. 15-24.)

After the answers were filed, defendant in error moved the court for judgment on the pleadings; the motion was granted, and judgment passed for the City and County of San Francisco for $2972, and interest. (Rec. fols. 24-26.)

The amount of the demand herein sued for, exclusive of interest, to-wit: $2972, being such as to bring the cause within the direct appellate jurisdiction of the Supreme Court of the State (State Court, art. 6, sec. 4), appeals were taken to that court. (Rec. fols. 28-31.) The Supreme Court ordered the cause to be heard and determined by the District Court of Appeal, and by said court the judgment was affirmed. (Rec. fols. 32-48.) A petition to have the cause heard and determined by the Supreme Court was filed in that court and the petition was denied. (Rec. fol. 78.) Thereafter the writ of error was granted by the Chief Justice of the Supreme Court. (Rec. fol. 89.)

ASSIGNMENT OF ERRORS.

The errors asserted in the assignment are:

First: The court erred in construing the Act of Congress entitled "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens," approved June 29, 1906; in that it erroneously held that of the fees which, by said Act, the defendant Mulcrevy, as Clerk of the Superior Court of the State of California, in and for the City and County of San

Francisco, is required to collect for his services in naturalization matters, the half thereof, which he is by said Act authorized to retain, is retained to the use of the City and County of San Francisco.

Second: The court erred in holding that the provisions of the charter of the City and County of San Francisco apply to fees collected under the authority of the Act of Congress above mentioned and particularly to the one-half thereof, which he, the said Mulcrevy, as such clerk, is thereby authorized to retain.

Third: That the interpretation put upon the provisions of the charter of the City and County of San Francisco by the said court is contrary to and in violation and contravention of the said Act of Congress, as to the use and disposal of the one-half of the fees above referred to, which said Mulcrevy is authorized to retain.

Fourth: That the judgment of said court denies to said Mulcrevy a right accorded him by the Act of Congress above mentioned, to-wit: his right to retain to his own use the one-half of the fees which he is, by said act, authorized to retain. (Rec. fols. 89-90.)

BRIEF OF THE ARGUMENT.

The moneys which clerks of courts retain under the act of Congress are in payment for services rendered the United States, that is: for all services, whenever and in whatever connection rendered by them when engaged in administering the act. The question to be argued is: Does the clerk of a qualified State

court exercising jurisdiction under the act of Congress take the moneys he is thereby authorized to retain, to his own use or to the use of the beneficiary, if such there be, designated therefor by a local enactment.

The order of the argument, and the contention of plaintiffs in error, are outlined in the following headings.

I.

The importance of the question, in its bearing upon the administration of the act of Congress, as this is made to appear in the Reports of the executive Department having charge of the administration of the act; and the construction put upon the act by that Department.

II.

Some notice of the decisions of the State courts on the question.

III.

A summary review of the act, bringing out chiefly the part taken in the administration thereof by clerks of courts; to establish the proposition that:

When acting under the authority conferred upon them by the act of Congress, clerks of State courts are directly aiding the Federal Government in the accomplishment of federal aims and policies, and in the enforcement of all laws of the United States having to do, not with naturalization only, but with immigration, and with alienage and adoptive citizenship under the federal laws.

IV.

Considerations and authorities in support of the propositions that:

The matters as to which clerks of State courts directly aid the Federal Government being federal affairs, Congress exercised a sovereign and exclusive power in providing for their regulation: and, therefore, clerks of State courts are, when engaged in administering the act of Congress, agents exclusively of the Federal Government and as such are amenable only to the laws of the United States.

V.

Reasons, afforded by the terms of the act, for the proposition that:

The act of Congress intends that the clerks of courts shall hold to their own use the part of the naturalization fees which they are thereby authorized to retain.

VI.

Conclusion, to the effect that: *The charter of the City and County of San Francisco and the act of Congress are unrelated enactments, and there is not, and cannot be, a conflict between them.*

THE ARGUMENT.

I.

The importance of the question, in its bearing upon the administration of the act of Congress, as this is made to appear in the reports of the execu-

tive Department having charge of the administration of the act; and the construction put upon the act by that Department.

That plaintiff in error Mulcrevy is a county officer has, in and by itself, no special significance. It would be a material fact in a case which should turn upon the provisions of the charter of the City and County of San Francisco. But in this case, which turns upon the meaning and force of an act of Congress, it may be said to be irrelevant. The charter provisions apply to the city and county officers, as such; the provisions of the act of Congress apply to clerks of courts of record having a seal, a clerk and general jurisdiction in actions in which the amount in controversy is unlimited. Some of these are Federal courts, many have statewide jurisdiction, others not; but the extent of the jurisdiction, in this respect, and the fact that in the present case the clerk of the court is also a county clerk, have no bearing. The offices of county clerk and clerk of court are distinct in legal concept; and in many of the States are distinct in fact. When the office of clerk of court is held *ex officio* it is still a distinct office. (*People* v. *Anderson,* 20 Cal. 94.) Clerks of Federal courts have no relation to the political divisions of the States. It is with clerks of courts as, and only as, such that Congress was concerned; and it is with them in that character only that the executive Department has its dealings.

Clerks of the Federal courts are not concerned in the question here presented; they retain their share of the naturalization fees as compensation for services ren-

dered, and as a means of paying for clerical assistance. But in some of the States (the cases which have appeared in the reports will be cited presently), it has been claimed that the allowance made the clerks may be appropriated to local governmental uses. This question of right has engaged the attention of the Department of Commerce and Labor, and as the expressions of this Department as to the part taken by the clerks of State courts in the enforcement of the act, their right to the moneys they are authorized to retain thereunder, and the consequences of the doubt in that regard raised in such cases as the one now before this court, have a bearing on the point to be decided, some reference will be made to them. The reports disclose a positive construction by the Department that the allowance made to the clerks of courts, State as well as Federal, belongs to all of them alike, and that for the efficient administration of the act they must have this allowance; and the allowance should be increased.

In the Annual Report for 1912, it appears that during that fiscal year there were 2527 courts exercising naturalization jurisdiction; of which 250 were Federal and 2277 were State courts. The clerks of these courts prepared 507,426 declaration of intention, 191,-254 petitions and 139,930 certificates of naturalization. A duplicate, or triplicate, of the declaration, petition, or certificate, in each case, was forwarded to the Bureau of Immigration and Naturalization by the clerks, as required in the act, as well as a great number of other papers referred to in the Report. The decla-

rations, petitions and certificates sent to the Bureau are there supervised, and if not in strict accordance with the requirements of the act and the Regulations, they are sent back to the clerks of the courts "for the "correction of errors and the supplying of omissions "disclosed by the investigation of the examining "clerks of the Division".

In connection with a statistical showing of the immense volume of work done by the clerks, it is said: "The work disposed of by clerks of courts is *quite a "distinct and separate feature from that handled by "the courts themselves";* and the notice of the services rendered by the clerks concludes: "Much of the suc- "cess attained is due to them." (Ann. Rep. 1912, 369.)

Of the compensatory feature of the act it is said:

> "Each clerk is given by law, in payment for this work, one-half of the fees payable by and collected from the applicants, whether he does the work himself, in whole or in part, or employs a deputy. Under this arrangement the feature of compensation is automatic, self-operative, the collections bearing a fixed ratio to the amount of business transacted. Plainly this is an equitable method of compensation, *irrespective of the question as to the adequacy of the amount of compensation,* and, as was anticipated by the framers of the law, has operated with unvarying success both as securing sufficient clerical force in the offices of the clerks and in the prompt payment for the services rendered." (*Id.*, 376.)

The report for 1907 deals directly with the question

before the court. Remarking on the greater volume of business transacted in some of the Federal courts as compared with the State courts, this is attributed to some extent to local conditions, but the Report continues:

> "There can be no question, however, that in some, if not most, of the States the meagerness of the fees allowed to the clerks has deterred many State courts from assuming to naturalize aliens, who are thus constrained to resort to the United States courts, upon which the duty is obligatory. . . . To the complaints which have been made against the law as a whole, upon this ground, it is a sufficient reply to suggest that the fees be enlarged so as to be more nearly compensatory for the amount and character of the work imposed upon clerks of courts and the risks incurred by them.
>
> "This situation has been further accentuated by the opinions of the legal authorities of some of the States *which provide a fixed annual salary for the clerks of their courts, that the naturalization fees cannot be retained by such clerks as compensation for the additional work required by the naturalization act, but must be accounted for to the State.* . . . Both for the public convenience of access to the means of securing citizenship and to relieve the Federal courts of the excessive burden which would seriously interfere with the prompt disposal of general litigation, *it seems important to raise the scale of fees and to declare by legislation, as is a fact, that State courts and their clerks are, when engaged in administering the naturalization law, agencies exclusively of the*

Federal Government and as such amenable only to laws of the United States.

"It may be conceded, that the General Government has no power to impose with authority any duties upon tribunals which are exclusive creations of the States. On the other hand, if such tribunals with the tacit or expressed consent of the sovereignties to which they owe their existence, assume a permissive jurisdiction granted by the General Government, *their exercise of it is bound strictly by the terms of the authority equally with the Federal courts.*" (Ann. Rep. 1907, 195.)

Referring once more to the amount of naturalization business transacted, relatively, by the State and Federal courts, it is said in the Report for 1908:

"The truth is, as explained in the last report, the fees allowed to the clerks of courts are so disproportionate to the labor and responsibility with which they are now burdened that they try to avoid—if not totally, as much as they can—entertaining naturalization proceedings." (Ann. Rep. 1908, 284.)

Among the recommendations proposed to be made to Congress in the report last cited is the following:

"The next most important recommendation is that the fees be increased so as to at once to pay the clerks of courts adequate compensation for their labor and responsibility and to make the service rendered by the Government self-supporting as near as may be." (*Id.*, 298.)

It is evident from the foregoing pronouncements that clerks of the State courts, making up more than

nine-tenths of the clerks who assist in enforcing the act of Congress, are a substantial part of the system in which the act is made to operate; that the question as to whether these clerks shall be permitted to retain their allowance to their own use has an important bearing on the administration of the statute; and that in the opinion of the executive Department, the allowance belongs to the clerks; and should be increased.

II.

Some notice of the decisions of the State Courts on the question.

The question to be argued, with differences as to the local enactments involved which, it is thought, do not go to the merits, has been presented to the courts of several of the States; and the answers are in conflict. The cases in which it has been passed upon are the following:

California: *San Francisco* v. *Mulcrevy*, 113 Pac. 339, 15 Cal. App. 11;
Indiana: *State* v. *Quill*, 102 N. E. 106;
Massachusetts: *Inhabitants of Hampden County* v. *Morris*, 93 N. E. 579, 207 Mass. 167;
New York: *In re Beyer*, 130 N. Y. Supp. 281, 21 Misc. 443;
Oregon: *Fields* v. *Multnomah County*, 128 Pac. 1045;
Utah: *Eldredge* v. *Salt Lake County*, 106 Pac. 939, 37 Utah, 188;
Washington: *Franklin County* v. *Barnes*, 123 Pac. 779, 68 Wash. 488;

Wisconsin: *Barron County* v. *Beckwith*, 124 N. W. 1030, 142 Wis. 519.

The Indiana, Massachusetts, New York, Oregon and Utah Courts hold that the clerk retains the fees to his own use; the decisions in California, Washington and Wisconsin are that the clerk must account pursuant to the state statute.

The chief divergence of opinion between the courts is as to the character, in relation to their local offices on the one hand and the Federal Executive on the other, in which clerks of courts perform their duties under the act of Congress. For instance: in Eldredge v. Salt Lake County (*supra*), the Supreme Court of Utah says: "It seems to us . . that in nat- "uralization proceedings the United States Govern- "ment exercises sovereign functions, which exclusively "belong to that government, and further that in au- "thorizing the state courts to act in such proceedings, "the national government selects such courts, and the "clerks thereof, as governmental agencies through "whom said government is discharging its peculiar "functions of national sovereignty." In Barron County v. Beckwith (*supra*), on the other hand, the Wisconsin court characterizes the services rendered by the clerk as "strictly official", and says: "The natu- "ralization proceedings are proceedings in court and "the clerk, in performing services therein acts in his "official capacity as clerk of the court." The expression "naturalization proceedings", when employed as indicating generally the things for which clerks of courts are allowed to retain moneys under the act of

Congress, should import all proceedings of the clerk for which the payment is intended; it should, in other words, import all services rendered by the clerks under the naturalization act. To characterize these services as "proceedings in court" is altogether inadequate; as will appear from the summary of the act under the next heading.

The doctrine in the Utah case, that "in naturaliza-"tion proceedings the United States exercises sover-"eign functions, which exclusively belong to that gov-"ernment", is not openly questioned in any of the decisions. That the clerk of a State court has his powers in such proceedings by virtue of a law of the Federal Government, is as indisputable as that he has the powers which are appurtenant to his local office by virtue of the laws of his State. It was in this view that Congress legislated; not as limited by the various laws of the States in respect to their political or other divisions, or in any respect whatever, but as exercising sovereign and exclusive functions of the Federal Government. Yet the California Court says that it was "by virtue of" his local office that the clerk of the Superior Court was "enabled" to receive the naturalization fees. As a private individual no one is entitled to receive either naturalization fees or court fees. As clerk of the Superior Court, plaintiff in error Mulcrevy was enabled to receive both naturalization fees and court fees; but his enablement came as to the former from the act of Congress, as to the latter from the laws of the State. When acting in naturalization matters,

then, the clerk of a State court does not exercise any official power of *his government,* that is, of the government by which *his office exists;* he acts by and under an authority which, *as clerk of a State court,* is not the authority of his government. All that the clerk of a State court has by virtue of the laws of his State is the personal qualification, *i. e.,* incumbency in the office of clerk of court, required by the act of Congress; all his other qualifications, and all his authority, he has from the act itself. It cannot therefore be rightly said that the acts of the clerk of a State court, done by virtue of an authority conferred by the United States, are "strictly official", and that he acts in his official capacity as clerk of his court.

It may be correctly said that the incumbent of the office mentioned acts in an official capacity, in the sense that his acts have an official character. They have this character, however, from the source of the authority by which he performs them; his official capacity has reference to the Department of the Federal Executive which he serves.

> "A person may act in an official capacity because he is an official lawfully appointed and qualified, and acts as such; or he may act in an official capacity because he lawfully performs duties which are of an *official character.*" (*United States* v. *Van Leuven,* 62 Fed. 66; see 29 Cyc. 1472.)

When engaged in administering the act of Congress the clerk of a State court lawfully performs duties in behalf of the Bureau of Immigration and Naturali-

zation of the Department of Labor, which is an office of the United States; he represents that office, and his services are in aid of the official duties committed to that office. Although he holds no federal office, his duties have an official character, and so he acts in an official capacity in the second sense of the phrase, as above defined.

The quotations from the Utah, Wisconsin and California decisions exemplify the respective attitudes of the courts which sustain the contention of plaintiffs in error, and those which reject it. The former hold, with the Department of Commerce and Labor, that clerks of State courts are agents exclusively of the Federal Government, and so the State may interfere with them no more as to their compensation than as to their specific duties; the latter hold that in naturalization proceedings the clerks act as local officials, and as their office is controlled by the State, it is concluded that the moneys they are allowed by the United States may be controlled by the State also.

III.

A summary review of the act, bringing out chiefly the part taken in the administration thereof by clerks of courts, to establish the proposition that: When acting under the authority conferred upon them by the act of Congress, clerks of State courts are directly aiding the Federal Government in the accomplishment of federal aims and policies, and in the enforcement of all laws of the United States having to do, not with natural-

ization only, but with immigration, and with alienage and adoptive citizenship under the federal laws.

Prior to the act of June 29, 1906, Congress confined its naturalization enactments to a simple process indicated in a general way. No central control or supervision of the proceedings had in the various courts was attempted and, except under the act of 1798, neither the courts nor the clerks of courts had any direct dealings with the Federal Government. (1 Stats. at L. 103; *Id.*, 414; *Id.*, 566; 2 Stats. at L. 153; Rev. Stats., sec. 2165; 19 Stats. at L. 2.) The acts of 1798 and 1802 provided for certain charges, but not for naturalization fees as commonly understood, and this matter came to be legislated upon by the States as to their tribunals, and was regulated in the federal courts by rules of court. In *Whittemore* v. *Seabury*, 23 How. Pr. 121, it was held that the clerk of a State court should account for naturalization fees collected under a State law. In *United States* v. *Hill*, 120 U. S. 109, it was held that the clerk of a United States court was not obliged to account for fees collected under the rules of court. The present act is at once comprehensive and detailed; an elaborate system of administration is provided, and the collection of naturalization fees is prescribed. The Bureau of Immigration and Naturalization which was in the Department of Commerce and Labor when the act was passed, has been transferred to the Department of Labor. (37 Stats. at L. ch. 141, sec 3, p. 796.)

The wide range of the administrative operations of the act of Congress, as extending beyond the subject of naturalization and affording assistance to all Departments of the Executive, appears concretely in the reports of the Department of Commerce and Labor. We quote from the report of 1908:

> "The Federal laws, as well as many of those of the States, confine to citizens of the United States certain privileges. These citizens are entitled to the protection of the Government while they visit foreign countries. This is a privilege of such great practical value, that every effort is made to obtain it, not infrequently by those who have been, if naturalized at all, clothed with American citizenship in disregard of the requirements of the law, if not by fraud. All cases of this sort are reported by the Department of State, and through the Division an investigation is made. . . . Correspondence of a similar nature is conducted with the United States Civil Service Commission, which submits the naturalization certificates of those who seek to enter the classified civil service of the Government. Results similar to those obtained by the investigations of doubtful applicants for passports have followed inquiries into the validity of certificates acquired by candidates for public office. . . . Under the steamboat inspection laws, licenses to officers of steam vessels may be issued only to citizens of the United States. The numerous frauds committed against these laws, led the Supervising Inspector General, late in the fiscal year to request of this division an investigation of and report upon all certificates of naturalized

> persons applying for licenses. . . . The public-land laws furnish occasion for correspondence with the General Land Office, of the Interior Department, sometimes in regard to the legality of acquired citizenship and more frequently with reference to the evidence required to be submitted either in support of claims filed upon public lands or to sustain the ultimate transfer, after naturalization, of title to the claimants. There will doubtless hereafter be occasion for similar work in consequence of the legislation in regard to employment in the Army, the Navy, the Marine Corps, etc. . . . *It cannot justly be said, therefore, that the extension of the work of the division in the respects above indicated is any less important or less necessary a part of its administrative work under the plain terms of the law* than is the function of administering those features of that law which guard the granting of citizenship since its enactment." (Ann. Rep. 1908, 291.)

The assistance of the clerks of courts is absolutely necessary to the work of the Department referred to in the foregoing quotation.

The act has several purposes, namely: to provide a rule of naturalization, and a process for safeguarding adoptive citizenship; to bring the immigration and naturalization laws under united executive supervision; and to provide an efficient means, under immediate control of the Central Government, for enforcing all federal laws in which alienage and adoptive citizenship are statutory factors. (The act is supplemented with regula-

tions for clerks of courts promulgated by the Secretary of Commerce and Labor, under authority of section 28 thereof, which will be hereafter referred to as the Regulations.) The title: An Act to establish a Bureau of Immigration and Naturalization, and to provide a uniform rule for the naturalization of aliens throughout the United States,—shows that the act is not intended, as were former naturalization laws, to provide a proceeding for naturalization only, but to bring immigration and naturalization as subjects of administrative law into a direct statutory relation.

In the behalf last mentioned section 1 provides for a registry to be made of each alien arriving in the United States, of his name, age, occupation, personal description, place of birth, intended place of residence, the date of his arrival and, if he enters through a port, the name of the vessel in which he came. This registration may develop facts which will bring the immigration laws into immediate action. A certificate of such registry, it is also provided, shall be given to each alien; and, under section 4, at the time of filing his petition for naturalization, the applicant must file this certificate with the clerk of the court to which his petition is made. From time to time, under provisions which will be referred to presently, this record is supplemented, through the clerks of courts, with copies of declarations of intention, petitions for admission to citizenship, certificates of citizenship, reports of cancellation of certificates of citizenship, and certified copies of proceedings and orders in naturalization matters.

The operations of the law, therefore, are made to begin with the arrival of the alien immigrant; and they are thereafter in supplemental concurrence with the immigration statutes. A result of this, is the establishment and maintenance of a great record of aliens in the United States and of its adopted citizens, of their descriptive identity, nationality, antecedents, descendants up to the time of adoption, occupations and places of residence. And the intended purpose of this record, and its use in the work of the Department, as appears in the Report of the Secretary quoted above, is, not only to serve in enforcing the immigration and naturalization laws, but to aid all other Departments of the Executive in the administration of all federal laws in which alienage or adoptive citizenship is a factor, and to assist the Government in its policies as to foreigners and its dealings with foreign powers.

To the ends mentioned in the last paragraph every act which clerks of courts may be called upon to perform under the statute has been standardized in blank forms, prepared and issued by the Bureau, with a direct view to the operations of the executive Department. (Sec. 3; Regulations, *passim.*) Regulation 18, for instance, provides:

> "Original declarations of intention, or certificates of naturalization, issued subsequent to September 26, 1906, and surrendered to the General Land Office in support of entries upon public land, may be returned upon proper application. In cases of declarations of intention, the clerk will forward the application to the Bureau of

Immigration and Naturalization (Division of Naturalization), accompanied by a certified copy of Form 2215. In cases of certificates the application will be accompanied by a personal description of the applicant. In both instances, a description of the land should be included, giving the section, township and range, together with the date and place of making the entry."

It is obvious that what is done by a clerk of court acting under this Regulation, has no reference to his court or any proceeding pending, or contemplated, therein; and that he does not act in his local official capacity as clerk of the court. His clerkly relation is toward the executive Department; and his services are in behalf of the General Land Office.

And so it is with all the requirements made upon the clerks of courts, that is: they all have direct reference to the operations of the central Bureau. Declarations of intention are made out by the clerk and must set forth, among other things, the several items of entry required in the registry made at the time of the declarant's arrival (Sec. 4); they must be made out in triplicate, and one of them forwarded to the Bureau. (Reg. 6, 22.) The declaration of intention may disclose matters which occasion deportation under the immigration laws, and the naturalization process will in that case come to an end before it has reached the court. If it progresses to the filing of a petition for admittance to citizenship, the petition must be made out by the clerk, in duplicate, setting forth numerous items in addition to those above referred to, and his certificate of registry must

be filed therewith. (Sec. 4.) One of the duplicates must be transmitted to the Bureau (Reg. 8, 22), and the Bureau must be informed of the time set for the hearing (Reg. 15), so that the United States may have opportunity to exercise its right to appear, produce evidence, and be heard in opposition, if so advised. (Sec. 11.) A duplicate of every certificate of citizenship issued must be sent to the Bureau (sec. 12); and a report made of the name of each alien to whom naturalization is refused (sec. 12), and of the reasons for the refusal. (Reg. 19.) When a certificate is set aside, a certified copy of the order must be transmitted; and if the order be not made in the court whence the certificate issued, the clerk of the court in which the order is made must forward a certified copy thereof to the clerk of the court whence the certificate issued, who must enter the order, cancel the original certificate, and notify the Bureau thereof. (Sec. 15.) If application is made for the issuance of a declaration of intention or a certificate of citizenship claimed to have been lost or destroyed, the clerk must take a sworn statement containing full information in regard to the lost or destroyed paper and as to the time, place and circumstances of the loss or destruction, forward this to the Bureau and await its instructions. (Reg. 17.) All such certified copies of proceedings and orders as may be requested by the Bureau shall be furnished by the clerks. (Sec. 12.) Many other requirements, all intended for the convenience and uniformity of departmental routine, are contained in the Regulations.

The Regulations throughout prescribe, or assume, that clerks of courts will be at the direction and under the control of the Secretary of the executive Department, whether done in or out of court, and whether provided for in the act or the Regulations, their services have reference to that Department. One of the results in great part of these doings of the clerks is, as has been said already, the establishment and maintenance of that great record of aliens in the United States and of its adopted citizens, contemplated in the act of Congress: *"Much of the success attained is due to them."* (Ann. Rep. Sec. Com. and Lab., 1912, *supra.*)

The foregoing summary has been made with a regard, chiefly, to the bringing out of the immediate participation of clerks of court in the administration of the act. How its administration serves the several Departments of the Executive appears from the Report of the Secretary of Commerce and Labor, above quoted. That its administration has a direct bearing upon the foreign policies and international relations of the Government, and its dealings with foreign powers, is evident. The operations of the act begin with the arrival of the subject of a foreign power and are thence in co-operation with the immigration statutes. They culminate in the exercise of the "natural and inherent right", which the alien has by virtue of the municipal law of the United States (Rev. St., sec. 1993), of expatriation from his former allegiance.

IV.

Considerations and authorities in support of the propositions that: The matters as to which clerks of State courts directly aid the Federal Government being federal affairs, Congress exercised a sovereign and exclusive power in providing for their regulation: and, therefore, clerks of State courts are, when engaged in administering the act of Congress agents exclusively of the Federal Government, and as such are amenable only to the laws of the United States.

Admittance to United States citizenship may be had only by authority of the political department of the National Government; acting directly as in instances of collective naturalization, or through a rule provided by Congress; and the rule as provided and as to all it prescribes is exclusive.

It has been said that the States are not obligated to afford the aid of their tribunals and officers in the administration of the rule; but if the State directs, or permits, its courts and their officers to act, then the rule must be administered in the full intent of Congress and in the mode prescribed.

The present act is concerned with immigration, naturalization, and alienage under the Federal laws.

> "The Congress shall have power . . . to regulate commerce with foreign nations. . . . to establish an uniform rule of naturalization . . . throughout the United States . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing

provisions." (U. S. Const. Art. 1, Sec. 8.) "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." (*Id.* Art. 6.)

The powers to regulate immigration and naturalization are vested in the political department of the government, and may be exercised by treaty, special act of Congress, or by general laws.

Nishimura Ekiu v. *United States*, 142 U. S. 651;
Van Dyne, Naturalization, 266.

When these powers are exercised in a general law the law has an exclusive operation.

Chirac v. *Chirac*, 2 Wheat, 259;
Matthews' Lessee v. *Rae*, 3 Cranch, C. C. 699;
Minneapolis v. *Reum*, 56 Fed. 576;
Levin v. *United States*, 128 Fed. 826;
Matter of Ramsden, 13 How. Pr. 429;
Lynch v. *Clarke*, 1 Sand, Ch. 583;
State v. *Libby*, 92 Pac. 350, 47 Wash. 481.

The clauses in state constitutions, and among them in the Constitution of California (*ante*, 3) that certain courts shall have the power of naturalization, is not an assertion of inherent State power, but a direction to the State courts to administer the federal law.

State v. *Libby*, 92 Pac. 350, 47 Wash. 481.

In an opinion of the Supreme Court of California,

Ex parte Knowles, 5 Cal. 300, it is said, and it is *dictum,* that power to naturalize aliens as citizens of the United States cannot be conferred upon the State courts by Congress, but is original in the State. The case is noticed in Robertson v. Baldwin and Levin v. United States (*supra*), and learnedly discussed by Mr. Justice Hoffman in *Re Ramsden,* 13 How. Pr. 429. But, whatever be thought of the view of the California court as to the source of the jurisdiction, it is said in the opinion—and this suffices for the purposes of the present case—"That the States, if they "choose to exercise the power as an original one, "must abide by the rule which Congress makes, there "cannot be the slightest difference of opinion." Call it what one may, the power of courts is dependent for action upon Congress, that is, Congress engages and directs the power and makes it an agency for federal purposes.

Being vested exclusively in the political department of the government, Congress is independent of the Judicial Department in providing a uniform rule of naturalization, that is: the power vested by the Constitution in the Judicial Department need not be invoked. Nor does the providing a rule of naturalization require the intervention of any judicial tribunal or judicial officer. An act which should ordain that one who makes oath before any officer authorized to administer oaths, that he foreswears all foreign allegiance and will support the Constitution of the United States, shall thereby become naturalized, would be a uniform rule. The power to provide the rule

being plenary, and the enactment supposed having the note of uniformity, such an act would be within the scope of the power.

Robertson v. *Baldwin,* 165 U. S. 275;
Levin v. *United States,* 128 Fed. 826.

In naturalization matters, as in the regulation of immigration, Congress is free to provide or adopt such means of carrying out its power as it may deem appropriate to the accomplishment of the intent, scheme and purposes of the contemplated enactment.

> "Naturalization of aliens is an act of grace not right, and is not necessarily a business of the courts. It is lodged in the courts for convenience, and, at the pleasure of Congress can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with the supervision of the operations under the act, or with any executive officer, as is now lodged the right and power to determine whether certain aliens shall be allowed to come into the country at all."

United States v. *Dolla,* 177 Fed. 101, 105.
Levin v. *United States,* 128 Fed. 826;
Prigg v. *Pennsylvania,* 16 Pet. 539;
McCulloch v. *Maryland,* 4 Wheat, 316;
Fong Yue Ting v. *United States,* 149 U. S. 698;
Lem Moon Sing v. *United States,* 158 U. S. 538.

Congress has conferred authority to hear and finally determine as to the fact of citizenship, and the facts

upon which an asserted claim of citizenship depends, on executive officers.

> *Chin Bak Kan* v. *U. S.*, 186 U. S. 193;
> *United States* v. *Sing Tuck*, 194 U. S. 161;
> *United States* v. *Ju Toy*, 198 U. S. 253.

The courts and clerks of courts on whom the naturalization jurisdiction is conferred, having been freely designated by Congress to serve the purposes of the Federal Government, and having all their jurisdiction and authority in the premises from the act of Congress, they are instrumentalities, or agencies, of the Federal Government.

> *United States* v. *Jones*, 109 U. S. 513;
> *Robertson* v. *Baldwin*, 165 U. S. 275;
> *Levin* v. *United States*, 128 Fed. 826;
> *People* v. *Sweetman*, 3 Parker's Cr. Rep. (N. Y.) 358;
> *State* v. *Quill*, 102 N. E. 106;
> *Inhabitants of Hampden County* v. *Morris*, 93 N. E. 579, 207 Mass. 167;
> *Fields* v. *Multnomah County*, 128 Pac. 1045;
> *Eldredge* v. *Salt Lake County*, 106 Pac. 939, 37 Utah, 188.

Nothing that has been said imports that State courts become Federal courts, when administering the act of Congress. In a sense, as in *United States* v. *Aakervik*, 180 Fed. 137, 141, it may be said:

> "All [courts] are, for the purposes of the naturalization act, Federal courts, and one set of courts is not foreign to the other."

But, as the Supreme Court of Utah says:

> "The question as to whether the State courts continue or cease to be State courts while acting in naturalization cases, while interesting is not material. It is enough for the present to know in so doing such courts are merely agencies of the National Government." (*Eldredge* v. *Salt Lake County, supra.*)

The States cannot exercise control over, nor interfere with, nor in any way affect to their disadvantage the agencies, or instruments of the Federal Government, except in so far as Congress may see proper to permit.

> *Farmers' National Bank* v. *Dearing*, 91 U. S. 31.

A statutory provision awarding compensation to persons acting under its authority and in furtherance of its purposes, is always of the substance.

> "The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties."
>
> *Dobbins* v. *Commissioners*, 16 Pet. 435.

The view of the executive Department, that clerks of State courts are, when engaged in administering the naturalization law agents exclusively of the Federal Government, and as such amenable only to the laws of the United States, is pointedly expressed in the passage of the departmental report already quoted. (*Ante*, 13-14.)

Regarded with reference to their amenability under the act the proceedings of clerks of courts clearly are not appurtenant to their local office, for they are made directly answerable to the United States. There is not a duty prescribed for them to which a penalty, civil or criminal, is not attached. For refusal or neglect to comply with any of the requirements concerning the receiving of declarations or petitions, or in reporting them to the Bureau, the clerk is liable to a forfeiture of twenty-five dollars in each case. (Sec. 12.) He is responsible for every blank certificate of citizenship received from the Bureau, and liable in the sum of fifty dollars for each certificate unaccounted for. (Sec. 12.) If he willfully fail to render true accounts he is deemed guilty of embezzlement of the public moneys. (Sec. 20.) To demand or receive any fees save those specified, is a misdemeanor. (Sec. 21.)

Regarded with reference to the source of their authority the acts of clerks of courts cannot be "strictly official", for their authority comes from a source external to and independent of their office and of the government which creates the office.

State v. *Hocker,* 63 Am. St. Rep. 174, note p. 181;
Eldredge v. *Salt Lake County, supra.*

Regarded in their relation to the office served by them, their acts are not strictly official, for they serve an office of the Federal Government. The clerks are a substantial part of the system in and by which the

act is enforced: "*Much of the success attained is due* to them." (Secty's. Rep., *ante*, 12.) The clerk of a State court is an officer by virtue of the State laws, but these laws confer no authority in naturalization matters. His authority in that regard is conferred by the act of Congress, but he is not an officer of the United States. He does not, therefore, act in an official capacity towards either government, in the first sense of the phrase as defined in *United States* v. *Van Leuven*. (*Ante*, 18.) But by an exclusive federal authorization he lawfully renders services to an office of the United States Government, and so all his acts have an official character with reference to that office.

Regarded in their immediate nature the duties performed are not appurtenant to the office of clerk of court. The clerks act in the general administration of the Federal law. The declarations, petitions, certificates they make out, are supervised by the examining clerks of the Division of Naturalization, and if not in strict conformity with the act and the Regulations they are returned for correction or re-execution. (Secty's. Rep., *ante*, 12.) All of their transactions with the Bureau, and these include almost all of their services, are performed without any reference to the court.

See

United States v. *Hill*, 120 U. S. 169;
Hill v. *United States*, 40 Fed. 441;
United States v. *McMillan*, 165 U. S. 504.

There is but one regard in which the legal status of clerks of courts under the act of Congress has a consistent and logically definable character, that is: they are persons whom Congress has designated to act in behalf of the Federal Government. Because of their closeness to the courts and the nature of the duties appurtenant to their office, they are convenient and experienced for the purposes of the act, and that is the extent to which their office figures in the enactment. *All that the clerk of a State court has by virtue of the laws of his State is the personal qualification, i. e., incumbency in the office of clerk of court, required by the act of Congress; all his other qualifications and all his authority he has from the act itself.*

A disregard of the distinct imports of the phrase 'official capacity', and a consequent application of a wrong rule of law to the case presented, is apparent in the California, Washington and Wisconsin decisions. In *Barron County* v. *Beckwith,* the earliest case, the Wisconsin court says that the State statute covers all fees coming to the clerk in his "official capacity", and continues: "We think it cannot be successfully "maintained that if during the salary term the legisla- "ture of the State should increase the fee bill under the "fee system as to clerks of courts, the clerks, though "on a salary basis, could retain in addition to the "salary the extra fees provided by legislative enact- "ment after the salary had been fixed. *No reason "appears why the same rule should not apply to the "change in fees by Congress.*" That is: the decision

rests on the application of a rule, good as between a State enactment and a county officer in his "strictly official" capacity, to a case between the State enactment and a county official performing services which have an official character only, and this by virtue of an act of Congress.

The California court quotes the above from *Barron County* v. *Beckwith* with approval, and applies the rule there invoked to the case at bar, it says: "This case is the same in principle as *In the Matter* "*of Dodge*, 135 Cal. 512, where it was held that the "*county assessor* was not entitled under the *charter* "to retain for his own use certain percentages on the "poll taxes collected under the *state law*." (Italics ours.) An examination of the case last cited will expose the fallacy of the reasoning of the California, Washington and Wisconsin decisions. In the *Matter of Dodge*, the State Constitution ordained that municipal corporations may exercise through their charters certain powers as to county officers, and among them the power to provide for the compensation of such officers is enumerated, but not the power to provide their duties. Dodge was assessor of the City and County of San Francisco, and his compensation was fixed in its charter. The Political Code provided: "Poll-taxes must be collected by the assessors" (Pol. Code, sec. 3840), who "for services rendered in "the collection of poll-taxes shall receive the sum "of fifteen per cent". (*Id.*, sec. 3862.) Dodge claimed this percentage on his collections. The Supreme Court held that as to a matter provided for

in the charter, *under express authority the State Constitution*, to-wit: the compensation of a county officer for services strictly appurtenant to his office, the municipal charter was superior to the general State law. *The Matter of Dodge* is, as authority in this case, in every way analogous to the case of *Finley* v. *Territory*, proffered as authority in *Eldredge* v. *Salt Lake County*, and there clearly shown to be inapplicable. Not only is there not the similarity which the California court asserts between the case at bar and *Matter of Dodge*, but, it may be said, there is a contrariety of principle.

The Washington case, *Franklin County* v. *Barnes*, follows *Mulcrevy* v. *San Francisco* and *Barron County* v. *Beckwith* in method of reasoning and cites them and *Finley* v. *Territory* as authority.

V.

Reasons, afforded by the terms of the act, for the proposition that: The act of Congress intends that the clerks of courts shall hold to their own use the part of the naturalization fees which they are thereby authorized to retain.

The California court says: "The act authorized [plaintiff in error Mulcrevy] to retain one-half of the fees collected by him; but as to what he was to do with such half so retained did not concern the United States government, but was a matter solely between himself and the City and County of San Francisco"; and in the Washington case it is said: "It can be no matter of concern to the United States nor to the bureau of

immigration and naturalization, the beneficiary of one-half of the fees, what disposition be made of the other half retained by the clerks in the adjustment". Chief Justice Knowlton, on the contrary says:

> "Congress might well think that the elaborate proceedings required by the statute imposed such duties upon clerks of the courts, that the interests of the public would be promoted by giving them special compensation to be taken from the fees. As this is the policy of the law under which the court is acting, the legislature cannot nullify the statute by enacting that the clerks shall pay all the money to the county treasurer." (*Inhabitants of Hampden County* v. *Morris, supra.*)
>
> *Fields* v. *Multnomah County, supra.*

If the presumption that "compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties" (*Dobbins* v. *Commissioner, supra*), is to be indulged; if the consequence of diverting the fees will be (as it will) to substitute counties and cities, or their boards and officers, for clerks of courts in the matter of employing clerical assistance, and if the practice of the executive Department proceeds on the settled construction (as appears in the reports) that the act creates a direct, strict and single relation between it and the clerks of courts, and that its dealings are with them only, then it would seem that the disposition of the fees retained by nine-tenths of those to whom "much of the success attained is due", should be a matter of first concern to that Department.

Clerks of the Federal courts retain the fees to their own use; it was known to Congress that they would, and therefore intended that they should. Regarded in their respective official relations, two groups of clerks are dealt with in the act, namely, clerks of Federal courts and clerks of State courts; but the act makes no distinction between them. The same terms are made to apply to all clerks of all courts on which the naturalization jurisdiction is conferred, as well to their compensation as to their duties and liabilities. What is clearly intended as to one of these groups of clerks, in a statute dealing alike with both, should be presumed as intended to the other.

The act in terms imports an intent to compensate all clerks of courts who act under its authority. It, moreover, contemplates that the clerks will, in instances, be under the necessity of employing clerical assistance in the discharge of their duties, and speaks of this assistance as to be selected and employed by the clerk, and requires him to pay for it out of the portion of the fees he is authorized to retain.

To take up the particular terms of the act: the clerks are *"authorized to retain"*, are *"permitted to retain"*, a stated portion of the fees. As between a principal having full control of the fund and an exclusive agent of that principal, this can only mean that the agent is to retain that portion of the fees to himself. It is provided that the clerk *"shall pay "all additional clerical force that may be required in "performing the duties imposed by this Act upon the "clerks of courts from fees received by such clerks*

"in naturalization proceedings". These words clearly import that the clerk shall have control of his additional clerical force, shall have the right to select it, and to employ and dismiss as and when he sees fit. It would be unconscionable otherwise, for he is civilly and criminally liable to the United States for the diligent and proper management of his naturalization business. If there could be any doubt as to this, it is removed by the amendment of 1910, which will be presently noticed. And the clerk is to pay for this additional clerical force *"from the fees received by such clerks in naturalization proceedings"*, that is, from moneys he is *"authorized to retain"*. He is, therefore, *"authorized to retain"* one-half of the fees in order, amongst other things, that he may *"pay all additional clerical force that may be required"*. If the business transacted in the office of a clerk brings in fees in excess of $6000 in any one year, it was provided before the amendment above referred to, that the Secretary of the Department might allow him *"additional* COMPENSATION" for the employment of additional clerical force.

In 1910 the last sentence of section 13 was amended (36 Stats. 829), so as to read as follows:

> "And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the Secretary of Commerce and Labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, *to be selected and employed by that clerk*, additional to the clerical force, *for which clerks of courts are required*

by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said Secretary the naturalization business of such clerk warrants further additional assistance; provided, that in no event shall the whole amount *allowed the clerk of a court and his assistants* exceed the one-half of the gross receipts of the office of such clerk from naturalization fees during such fiscal year; Provided further, that when, at the close of any fiscal year, the business of such clerk indicates in the opinion of the Secretary of Commerce and Labor that the naturalization fees for the succeeding year will exceed six thousand dollars the Secretary of Commerce and Labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of the fiscal year until such time as the remittances indicate in the opinion of said Secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this Act."

The amendment manifests the same intent as the original clause. It declares that in the case specially provided for, salaries shall be allowed for clerical assistance, *"to be selected and employed by that clerk"* in addition to the clerical force for which clerks *"are "required by this section to pay from fees received "by such clerks in naturalization proceedings"*; and further provides that the whole amount *"allowed the clerk of a court and his assistants"* shall not exceed one-half of the gross receipts of his office.

The singleness, the sharpness of definition, of the

intended relation between the executive Department and the clerks of courts, as to the moneys the latter are authorized to retain, is pronounced. And sound reason for this, apart from the policy of compensation, is apparent. Counties and cities are not convenient or responsive agents. They act through a complicated machinery of ordinances, resolutions, approvals, etc. For instance; in the City and County of San Francisco, as will later appear, if an officer desires additional clerical assistance for any purpose he must first satisfy the mayor of its necessity, then the mayor may recommend it to the supervisors, and unless his recommendation is supported by an affirmative vote of not less than fourteen of the eighteen supervisors, the assistance will not be authorized. Evidently to let such a third party into the scheme of the act of Congress so as to take the moneys allowed the clerks, would be not only to thwart the intent, but to hamper if not frustrate the operations of the act.

Moreover, when a statute provides compensation for services required by its provisions and necessary for the accomplishment of its objects, it is inferrable, or to be presumed as matter of construction, that compensation was deemed politic, and was intended to have effect by going to those who render the services. (*Dobbins* v. *Commissioners, supra.*) It is, also, inferrable that if these persons are deprived of compensation there will be shirking, indifference and neglect. It appears, from the departmental reports quoted, that because of the meagerness of the fees now allowed, in view of the magni-

tude of the services required and the attendant responsibilities, the naturalization act has not been well received by the clerks.

The act of Congress discloses a mixed federal policy as to the mode of compensation; it is in part by fees, in part in a stated contingency by salaries. The method of compensation, as is said in the Report, is automatic, self-operative, and equitable. (*Ante*, 12.) The policy of the States wherein the question has been passed upon was to compensate clerks of courts by salaries. The laws in which these policies are expressed are enactments of sovereignties, each supreme within its respective constitutional sphere. The matter of naturalization fees is within the constitutional sphere of legislation of the United States, and as to that matter the act of Congress is the supreme enactment.

If the act of Congress is supreme, then an assertion of right by a third party to control the compensation accorded the clerks, challenges the authority of the act. A superior who may not control the compensation of one whose services he would have, is not a full superior. And, if the services required be of such magnitude that the agent needs, or may need assistance, and a third party may seize the fund provided for that emergency, then in that emergency and as to its consequences, the authority of the superior will be subverted and his affairs will be at the mercy of the third party.

In this connection, the California court suggests, by implication, a substituted mode of carrying out the

administration of the act under the San Francisco charter. Section 35 of article XV of the charter is given in substance, in the opinion, to the effect that when any officer, board, or department of the municipal government requires additional clerks, application therefor shall be made to the mayor, and if the mayor be satisfied that the assistance is necessary he may recommend it to the supervisors, and the supervisors may then, by an affirmative vote of not less than fourteen members, authorize the appointment and provide the salaries. The section also, by reference, provides that the appointment shall be made from a civil service list of candidates for positions.

The first comment to suggest itself is that the provision does not apply. The charter is concerned with local officers and boards in their strict relations to their respective local offices or departments. The charter is intended for the government of the City and County of San Francisco, and the appointment of clerks and the payment of money out of the county treasury for the naturalization of aliens as citizens of the United States, is not a function of the municipal government, and is not in any way provided for in the charter.

But, if assistance could be lawfully afforded by the city and county government, the mayor might not be satisfied that assistance should be given; and if he was satisfied his recommendation might not be supported by not less than fourteen out of the eighteen members of the board of supervisors. If the assistance were actually provided it would not be "selected and

employed" by the person thereunto authorized and responsible to the United States for the work to be performed; and in the case where the naturalization business brings in fees in excess of $6000 per annum, the salaries of the clerks are not to be provided by a board of supervisors but by the Secretary of the executive Department. Mayors and boards of supervisors have no place in the scheme of naturalization as ordained by Congress; with them the Department of Labor can have no dealings.

It is also said in the opinion: "It was not for "[plaintiff in error Mulcrevy] to say that the ser- "vices were performed under the authority of the "United States, and not under the authority of the "State. His bond contained the condition that he "would faithfully perform all official duty that might "thereafter be imposed upon him by law. The act "of Congress was a law." A condition in an official bond cannot override an act of Congress; the bond is of no greater force than are the laws under which it is given. The act of Congress does not, moreover, impose any official duty within the meaning of the bond. And, while it does *impose duty*, it also *confers a right*. Why, then, was it not for that plaintiff in error to say that *having done his duty* under the authority of the United States he had the *related right* to compensation therefor accorded him *by that authority?*

The fact that is salient, when the position of defendant in error is considered, is that if states, and counties and cities are to take a hand in naturaliza-

tion business, the act, as framed by Congress and as intended to operate, will go to pieces. Parts of the machinery will have been removed, or put out of action, and if the mechanism work at all, it will not work as designed and turned out by its maker. The conclusion deduced under the last heading, expressed in the wording of the departmental report (*ante*, 13), is confirmed: "State courts their clerks are, when "engaged in administering the naturalization law, "agencies exclusively of the Federal Government, and "as such amenable only to the laws of the United "States."

VI.

Conclusion, to the effect that: The charter of the City and County of San Francisco and the act of Congress are unrelated enactments, and there is not, and cannot be, a conflict between them.

In an attempt to co-relate the act of Congress and the San Francisco charter, each statute should be read from the point of view of its respective legislature. The legislature from which the charter emanated was concerned with municipal affairs. The legislature which enacted the naturalization law was concerned about national affairs.

The provisions of the charter of the City and County of San Francisco have their proper application to the city and county officers, as such. The provisions of the act of Congress apply to clerks of all the qualified courts, as such, and without regard to other and local features of their political, or legal, status.

At the time the charter was approved by the legislature, January 26, 1899, fees in naturalization cases were prohibited. (*Ante*, 3.) The fees with which the framers of the charter dealt were fees chargeable under the laws of the State. When they provided that the officers of the city and county should pay all moneys coming into their hands, "no matter from what source derived or received", into the county treasury, they had in mind moneys received under authority of the State laws.

If the provisions of the charter apply to naturalization fees at all they apply to all of the fees, to the part to be remitted as well as the part authorized to be retained; which shows that they were not intended to apply to either part.

The charter follows the policy of the State Constitution and the general laws of the State, which is that officers shall be compensated for all services rendered in their "official capacity" by stated salaries. The phrase official capacity is employed in the first sense of the definition in *United States* v. *Van Leuven* (*ante*, 18).

There is, then, no conflict between the charter and the act of Congress; the enactments are not related.

Respectfully submitted.

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JAMES F. TEVLIN,
On the Brief.

No. 22,948

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1913

No. 133

HARRY I. MULCREVY, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Plaintiffs in Error,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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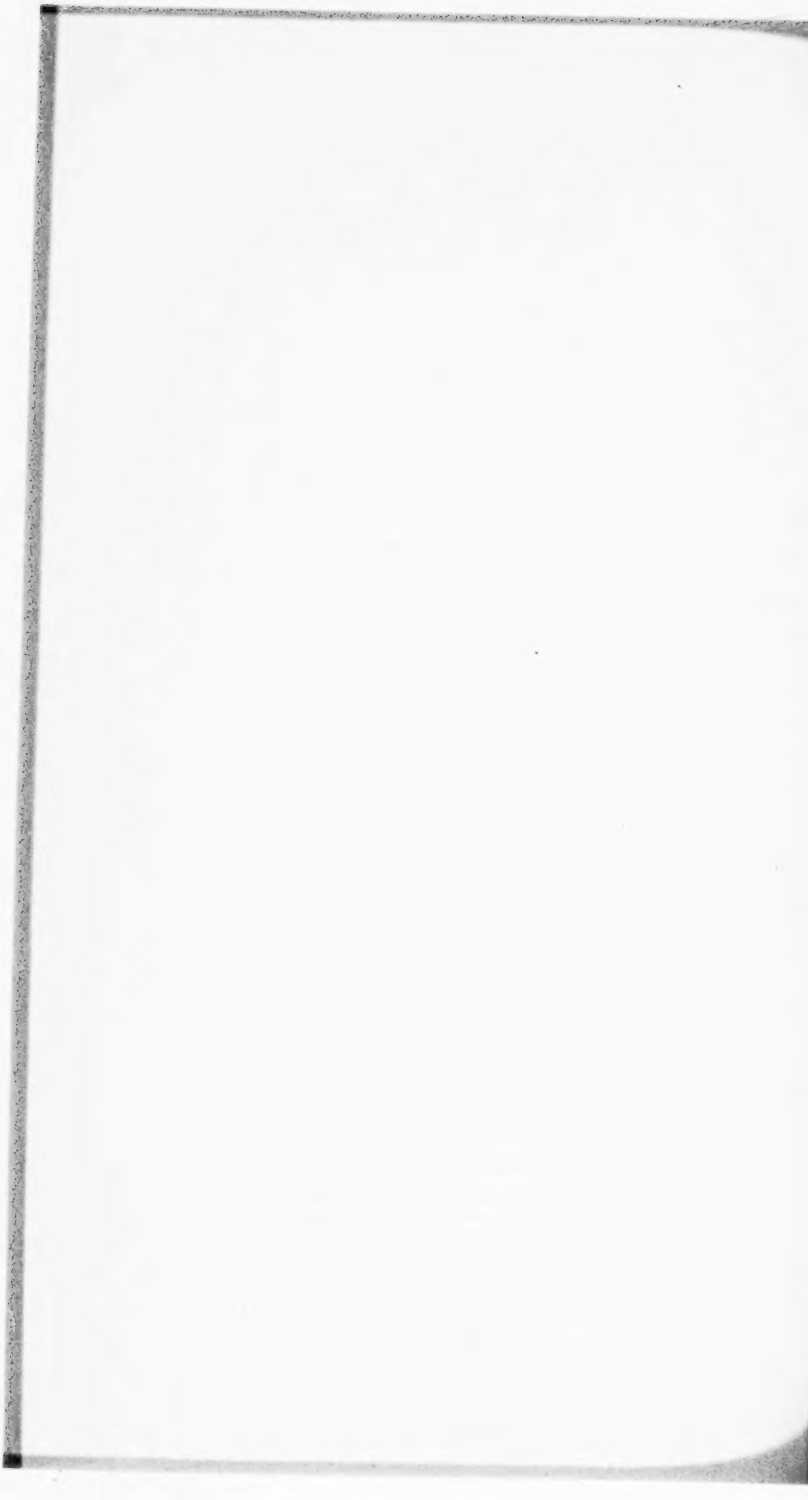

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List of Cases Referred to

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CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I.

TEXT OF THE LAW OF THE STATE OF CALIFORNIA AND OF THE CITY AND COUNTY OF SAN FRANCISCO WHICH, UNLIKE EVERY CASE BUT ONE CITED BY PLAINTIFFS IN ERROR, POSITIVELY COMMANDS THE COUNTY CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO TO ACCOUNT TO THE CITY AND COUNTY FOR ANY FEES RECEIVED, OF ANY CHARACTER WHATSOEVER.

(We shall later, under VI, show that in only one of the five cases cited by plaintiffs in error was

there a ruling contra to our theories, under statutes similar to the San Francisco charter.)

The Constitution of the State of California provided, at the time of the adoption of the charter of the consolidated municipal government of the City and County of San Francisco, as follows (Art. XI, § 8½, subd. 4):

> "Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said section eight of said article eleven (of the constitution), to provide for the manner in which, the times at which, and the terms for which the several county officers shall be elected or appointed, *for their compensation*, and for the number of deputies that each shall have, *and for the compensation payable to each of such deputies*."

Following are the relevant provisions of the San Francisco charter, in force at the time plaintiff in error accepted the position of county clerk of said city and county on January 8, 1906 (Trans. p. 3, fol. 4). They ever since have been and still are in full force and effect.

Article XVI, Section 34:

> "The salaries provided in this charter shall be *in full compensation for all services rendered*, and every officer shall pay all moneys coming into his hands as such officer, *no matter from what source derived or received*, into the treasury of the city and county within twenty-four hours after receipt of the same."

Article III, Chapter III, Section 2, is as follows:

"Salaried officers shall not receive nor accept any fee, payment, or compensation, directly or indirectly, for any services performed by them in their official capacity, nor any fee, payment, or compensation, for any official service performed by any of their deputies, clerks, or employees, whether performed during or after official business hours. No deputy, clerk or employee of such officers shall receive or accept any fee, compensation or payment, other than his salary as now or hereafter fixed by law, for any work or service performed by him of any official nature, or under color of office, whether performed during or after official business hours."

Section 1. "All moneys arising from taxes, licenses, fees, fines, penalties and forfeitures, and all moneys which may be collected or received by any officer of the city and county, or any department thereof, in his official capacity, for the performance of any official duty, and all moneys accruing to the city and county from any source, and all moneys directed by law or this charter to be paid or deposited in the treasury, shall be paid into the treasury. All officers or persons collecting or receiving such moneys must pay the same into the treasury. * * *"

Section 3. "Every fee, commission, percentage, allowance, or other compensation authorized by law to be charged, received or collected by any officer for any official service, must be paid by the officer receiving the same to the treasurer in the manner herein provided."

Section 4. "It shall be the duty of every officer authorized by law to charge, receive or collect any fee, commission, percentage,

allowance, or compensation for the performance of any official service or duty of any kind or nature, or rendered in any official capacity, or by reason of any official duty or employment, to deliver the same to the treasurer at the expiration of each business day. * * *"

ARTICLE XVI.

Sec. 17. "All moneys, assessments and taxes belonging to or collected for the use of the city and county, coming into the hands of any officer of the city and county, shall immediately be deposited with the treasurer for the benefit of the funds to which they respectively belong. If such officer for twenty-four hours after receiving the same shall delay or neglect to make such deposit, he shall be deemed guilty of misconduct in office and may be removed."

Article V, Chapter V, Section 1 provides that the county clerk "shall receive an annual salary of four thousand dollars." Section 2 reads as follows:

"To aid him in the discharge of his official duties, the county clerk may appoint a chief register clerk, who shall receive an annual salary of twenty-four hundred dollars; a cashier who shall receive an annual salary of eighteen hundred dollars; twelve court room clerks for the Superior Court, who shall each receive an annual salary of fifteen hundred dollars; five register clerks, who shall each receive an annual salary of eighteen hundred dollars; ten assistant register clerks, who shall each receive an annual salary of fifteen hundred dollars; sixteen copyists, who shall each receive an annual salary of twelve hundred dollars; and four clerks for the Police Court, who shall each receive an annual salary of fifteen hundred dollars."

Article XVI, Section 35 is as follows:

> "When any officer, board or department shall require additional deputies, clerks or employes, application shall be made to the mayor therefor, and upon such application the mayor shall make investigation as to the necessity for such additional assistance; and if he find the same necessary he may recommend to the supervisors to authorize the appointment of such additional deputies, clerks or employes; and thereupon the supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointments and provide for the compensation of such appointees, subject to the limitations contained in this charter, and subject to the provisions of Article XIII thereof."

(Art. XIII is the civil service article of the charter.)

As the Disrtict Court of Appeal said in this case Trans. p. 20, fols. 41-42):

> "The total salary list as so fixed and allowed for the office amounts to $58,600.00 per annum; and it would seem that it was intended to cover all services that might be required of the county clerk, and the pay of all deputies and employees that might be necessary in performing such services.
>
> "Moreover, in addition to the above salaries it is expressly provided in the charter (Sec. 35, Art. XV) (this should be Art. XVI), that when any officer, board or department shall require additional deputies, clerks or employees, application shall be made to the mayor therefor, and upon such application the mayor shall make investigation as to the necessity for such additional assist-

> ants, and that if he find the same necessary, he may recommend the supervisors to authorize the appointment of such additional deputies, clerks or employees, and thereupon the board of supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointments and provide for the compensation of such appointees. (See reference to the application of this section in Harrison v. Horton, 5 Cal. App. Rep. 415)."

The trend of legislation for some years past in many states, California included, has been to substitute fixed salaries for the fee system. The object has been to have a stated compensation which will cover a certain length of time, no matter how much or how little work might be done during that time.

In the *Matter of Dodge*, 135 Cal. at 514, the California Supreme Court says:

> "In the earlier history of the state it seems to have been the policy of the law to compensate county and city officials mostly or entirely by the fees collected for the work performed by such officials. In consequence of abuses growing out of this fee system, a change in the mode of compensating public officers is indicated in the constitution adopted in 1878-1879. The compensation of public officials, city and county, at present is mostly by way of a fixed salary, in lieu of fees."

II.

THE LAW OF CALIFORNIA CONFERS NATURALIZATION JURISDICTION UPON THE STATE SUPERIOR COURT.

The Constitution of the State of California, as adopted in 1879, vests naturalization jurisdiction in the Superior Courts of the state (the courts of record).

Article VI, Section 5 provides that—

> "* * * said courts shall have the power of naturalization, and to issue papers therefor".

The same language was incorporated in the Code of Civil Procedure in 1880, Section 76 reading:

> "The Superior Courts shall have original jurisdiction:
>
> * * * * * *
>
> 5. Said courts shall have the power of naturalization, and to issue papers therefor."

As early as 1853 the same jurisdiction had been conferred by the legislature upon the courts of record of the state (Stat. 1853, p. 267). This statute read as follows:

> "That the clerks of the courts of record in this state shall be entitled to receive for each certificate of declaration to become a citizen of the United States, and for making a record thereof, three dollars. The sum of three dollars as herein provided shall include the administration of all oaths or other preliminary proceedings, *and said papers herein provided for shall be issued by the court upon application of any individual entitled to receive them, and upon his complying with the provisions of the naturalization law.*"

III.

THE NATURALIZATION ACT OF CONGRESS, OF JUNE 29, 1906, WHICH ALSO CONFERS JURISDICTION ON THE STATE COURTS (34 Stat. at L. 596; 36 Stat. at L. 829).

The Act of 1906 changed the designation of the Bureau of Immigration, in the Department of Commerce and Labor, to the "Bureau of Immigration and Naturalization". This Bureau was placed under the control of the Secretary of Commerce and Labor (Sec. 1). The Act provides that said Bureau "shall have charge of all matters concerning the naturalization of aliens" (Sec. 1). There were created two divisions to this Bureau—one of Immigration, and one of Naturalization, with a Chief of each division. The clerk remitted the fees to the "Chief of the Division of Naturalization, Bureau of Immigration and Naturalization".

By the Act of March 4, 1913, adopted subsequent to the filing of the action herein (37 Stat. at L, part I, p. 736), the Department of Labor was created, and also the office of Secretary of Labor. The Bureau of Immigration and Naturalization was transferred from the control of the Department of Commerce and Labor to that of the Department of Labor. There are two bureaus, one called the Bureau of Immigration, and the other, the Bureau of Naturalization. The head of the Department of Naturalization is now known as the Commissioner of Naturalization.

The head of the Department of Immigration is the Commissioner General of Immigration.

IV.

THE ACT OF CONGRESS, PROPERLY INTERPRETED, DOES NOT REQUIRE THAT THE CLERK MUST KEEP THE FEES FOR HIS PERSONAL USE. IN THE ONLY CASES THUS FAR DECIDED BY THE STATE COURTS, WHERE THIS QUESTION OF INTERPRETATION WAS REALLY CONSIDERED, THAT IS, IN FOUR OF THE EIGHT CASES, THE COURTS AGREE WITH OUR THEORY.

Franklin County v. Barnes (Supreme Court of Washington, May 23, 1912), 123 Pac. 779.

The Washington Constitution and Statutes contain the identical language as the Constitution and Code of California, the Superior Court "shall have the power of naturalization and to issue papers therefor".

The question before the court was the very question presented in this case. An action was brought by Franklin County against the county clerk of that county for one-half of certain fees collected by him in naturalization proceedings.

The Constitution of Washington authorized the legislature, as the Constitution of California authorizes a municipal corporation, to fix the compensation of the county clerk.

The Statutes of Washington required, as does the charter of San Francisco, that the clerk turn over all fees received, to the county, and that his salary, fixed by law, should be his sole compensation.

The Washington Supreme Court interprets the Act of Congress of 1906 as requiring the clerk to account to the federal government for one-half of the naturalization fees, but the court says that the Act of Congress should not be interpreted as meaning that the other half must be kept for the clerk's personal use; that this is a question between the clerk and the state, with which Congress is not concerned.

And that, (p. 781, column 1),

> "Courts will not invoke an implication not necessary to the purpose of the law in order to raise a conflict between a federal and a state statute which would not otherwise exist. The objects of the two statutes, state and federal, are different. The language of each must be restricted to its own object or subject. This is a rule of construction often invoked to avoid an apparent conflict between two statutes of the same state (Endlich on Interpretation of Statutes, Section 211; Lewis' Sutherland Statutory Construction (2nd Ed.) p. 468), and there is equal reason for its application as between federal and state legislation. The obvious purpose of the federal statute was to exercise the power 'to establish a uniform rule of naturalization' conferred by section 8 of article 1 of the federal Constitution. It evinces no purpose to interfere with the power of the state legislature to fix the full compensation of county officers or to modify the duties imposed by the legislature upon those officers in accounting to the county. While the procedure, the forum, and the amount of the fees to be charged in naturalization proceedings are matters going to the uniformity of those proceedings, and

are therefore within the exclusive power of Congress to fix (Newman v. Libby, 47 Wash. 481, 92 Pac. 350), what disposition is made of the half of the fees relinquished by the Act in no manner affects the uniformity of the rule of naturalization the establishment of which is the sole purpose of the federal law as meeting the full purpose of the constitutional provision pursuant to which it was enacted. On the other hand, the state statute does not trench upon any matter connected with the uniform rule of naturalization established by the Act of Congress. It merely directs the disposition of money coming into the hands of the county clerk after all right or claims thereto has been relinquished by the Act of Congress. When the objects of the two statutes are considered and the language of each restricted to its object, there is no conflict."

At page 781, column 1:

"The appellant contends that, inasmuch as the federal Constitution (section 8, art. 1) confers upon Congress the power 'to establish a uniform rule of naturalization,' and Congress has by the Act of June 29, 1906, above quoted, established such a rule, definitely fixing the fees to be charged and the method of collecting and accounting for such fees, its jurisdiction is exclusive, and therefore that act supersedes all state legislation upon the subject. The premises are correct, but they do not justify the broad conclusion. By what seems to us to be a correct construction of the Act of Congress and the state statutes they present, at most, only an apparent, not a real, conflict. In order to create such a conflict, resort must be had, and an implication which is neither necessary to the purposes of the fed-

> eral statute nor unavoidably conveyed by the language used therein. The authorization of the clerk 'to retain one-half of the fees' does not necessarily imply a grant to him of those fees for his own use. The sentence in which this authorization is found was palpably intended merely to fix the basis of adjustment between the clerk and the bureau. With that adjustment the interest of the federal government ends. It can be no matter of concern to the United States nor to the Bureau of Immigration and Naturalization, the beneficiary of one-half of the fees, what disposition be made of the other half retained by the clerk on the adjustment."

In *Barron County* v. *Beckwith*, 124 N. W. 1030, the Supreme Court of Wisconsin passed upon the right of the clerk of a Circuit Court of that state, to retain fees collected by virtue of the Naturalization Act of Congress of 1906.

A state law authorized the county boards to place a clerk on a salary basis, which salary should be in "lieu of all fees, per diem and compensation for services rendered;" and which Act provided that the clerk should pay to the county treasurer "all fees, per diem and other emoluments of whatever kind received by him." It was held that the clerk could not retain any of the fees allowed by the Naturalization Act.

At page 1032, the court says of the recent Act of Congress:

> "It is further argued that by force of the words of the Act of Congress that the clerks

> are 'authorized' and 'permitted to retain one-half of the fees' involves the granting of a privilege to hold the fees as his own. We think the words used in this connection have reference solely to the adjustment under the Act of Congress between the clerks and the bureau. Clearly they cannot be held to authorize or permit the clerks on salary basis, to hold them as against the counties, if they are fees or emoluments which belong to the counties."

This is a reasonable interpretation of the statute, and being so interpreted, there is no conflict between the federal statute and the charter of San Francisco.

The District Court of Appeal of the State of California said in this case (Trans. p. 20, fol. 43):

> "The Act (of Congress) authorized him (Mulcrevy) to retain one-half the fees collected by him; but as to what he was to do with such half so retained did not concern the United States Government, but was a matter solely between himself and the City and County of San Francisco."

In re Beyer, County Treasurer, 130 N. Y. S. 281 (brief of plaintiffs in error, page 15).

This was a decision by the Supreme Court of New York, holding that the Act of Congress of 1906 prevailed over a state statute requiring clerks of courts to account to the county for naturalization fees.

First: This was a decision of one of the lower courts of New York.

Second: The court itself states that the only reason for the decision is that the highest court of Massachusetts had decided the same question (citing *Inhabitants of Hampden County v. Morris*, infra, p. 77). And the court states that its own views are that the Act of Congress should not be interpreted as requiring that the clerk personally retain the fees.

At pp. 283-4:

> "If the question now before the court had not been passed upon by the highest court of Massachusetts, we are frank to say we should be inclined to a different conclusion than that reached by the Massachusetts tribunal, and to hold that the federal statute was intended and should be construed not as in conflict with the state act, but was simply designed to reimburse the office for the clerical force required rather than to provide for the personal and independent emolument of the incumbent of the office. We do not, however, feel at liberty to disregard the decision of the question made by the highest court of Massachusetts. If a different holding is to be made in this state, it may, with more propriety be made by the appellate courts."

This case never reached the appellate courts of New York. The court states, at page 282:

> "This is a friendly proceeding for the purpose of obtaining a judicial decision as to whether the county clerk of the County of Erie is entitled to the fees received under the United States Statute for the naturalization of citizens."

Of the eight cases decided by the different state courts, on the question of whether the clerk is entitled to keep the naturalization fees for himself; *in the above four cases only, i. e., in Washington, Wisconsin, California and New York, is the question seriously discussed whether the Act of Congress should be interpreted as meaning that the clerk must retain the fees for his personal use. And in each of these cases, the courts express themselves in accordance with the theory we have above advanced.*

The Act of 1906 does not say that the clerk "shall retain fees for his own use", nor does it say that the fees shall go to "the person who is clerk," but rather to *the clerk*.

The Act merely says that the clerk "*is authorized* to retain one-half of the fees collected by him." "Authorized" means that the clerk is authorized to keep the fees so far as Congress is empowered by the Constitution to grant this authority. It imparts nothing beyond the constitutional limitations on the powers of Congress, which limitations we shall later discuss. Moreover, the word as used in this sense is purely permissive, and amounts to a quit-claim to any rights the federal government has in these fees.

Counsel, at page 40ff of their brief, rely upon the language of the Act providing that when the naturalization business reaches a cer-

tain figure, an increase in money may be allowed the clerk by the Secretary of Commerce and Labor as "additional compensation for the employment of additional clerical assistants." And also the requirement that the clerk must pay for any assistance from the fees he is authorized to retain.

All that these provisions mean is that the federal government will under certain circumstances, allow additional money for clerical service, and that no call can be made upon the federal government for any money to defray expenses except as received in fees. But so far as the Untied States is concerned, the city and county, just as well as the clerk, may be the final recipient of the money. What Congress did was to provide that for certain services rendered by a local official certain fees might be retained; that the local officials could not call for any money at all except as received in these fees; and that on a certain showing extra amounts, from fees, might be allowed. But Congress is not interested in what becomes of the money. If the City and County of San Francisco should itself put on an extra force of clerks, the Secretary of Commerce and Labor (or now, the Secretary of Labor), might recommend the extra allowance, knowing that it would finally go to the city, just as he would if he knew it would finally go to the clerk.

As suggested by the Washington Supreme Court in *Franklin County v. Barnes*, supra, the policy of the courts to sustain both of two state statutes,

rather than holding one inconsistent with the other, is of equal importance when we consider an Act of Congress as related to a state law. In fact we submit that there would be greater hesitancy upon the part of the courts to hold a federal and a state act inconsistent than to construe two state acts as being inconsistent. For the proper conduct of the many local activities of the several states requires that there be no clashing with federal authority if the same may be avoided. And where a federal statute may be reasonably interpreted as not in conflict with the law of a state, such interpretation should be given. There can be no question but what it is a proper exercise of the powers vested in the City and County of San Francisco for that city, in its charter, to fix the salary of its county clerk. This court then, we respectfully submit, will not so interpret an Act of Congress as to bring that Act in conflict with the San Francisco charter, and particularly when the object sought by Congress in fixing a uniform rule of naturalization is not affected.

See *Lewis' Sutherland on Statutory Construction* (2nd Ed.), pp. 464-469. Also *Endlich on Interpretation of Statutes*, Secs. 211, ff. and

Vol. 36 Cyc., p. 1146 (citing several cases).

Also, in a desire to avoid conflict, the court will rely upon the rule that acts allowing fees for public officers are to be strictly construed.

U. S. v. Van Duzee, 185 U. S. 278; 46 L. Ed. 909.

"Statutes granting fees to public officers are to be strictly construed."

11 Enc. of U. S. Sup. Ct. Rep., p. 168.

The quotation used by counsel for plaintiffs in law at p. 33 of their brief, from *Dobbins v. Commissioners*, 16 Pet. 435, regarding the presumption that compensation given by law is no more than the services are worth, is not at all in point. In that case a state attempted to tax the office of a captain of a United States Revenue cutter, a regular officer of the United States, appointed by sole authority of the United States, and with no official relationship whatever with the state government.

Again, it is elemental that if possible, a statute will be so construed as not to raise any questions of constitutionality, or validity.

If the Act of 1906 be construed as requiring that the clerk keep the fees for his personal use, we either have to say that the Act is an improper attempt to control a subject properly within the scope of state action, or that the state has improperly encroached upon the domain of federal action. The construction of the Act given by the Washington, Wisconsin and California Supreme Courts and by the Supreme Court of New York, so far as its own views are concerned, avoids any such situation.

V.

IF THE ACT OF CONGRESS IS INTERPRETED AS IN CONFLICT WITH THE SAN FRANCISCO CHARTER, THE CHARTER MUST PREVAIL ON THE QUESTION OF COMPENSATION OF A COUNTY OFFICER.

We therefore respectfully urge that the Act of Congress should be construed as authorizing the retention of one-half of the fees, and as leaving to the different states and political subdivisions thereof, the question of what shall ultimately become of such fees.

But if we accept the theory of counsel for plaintiffs in error and read the Act as requiring the clerk to keep these fees for his own use, then we respectfully submit that such a determination by Congress does not come within the power given by the federal Constitution (Art. I, Sec. 8), "to establish a uniform rule of naturalization." And it does infringe on the legitimate powers of the City and County of San Francisco exercised under authorization of the Constitution of the state. And so the local statute would control in a matter peculiarly of local character, to wit, the compensation of a county official.

Congress has no power to say to the State of California, or to the City and County of San Francisco—

> "The clerk of the Superior Court of your state, in and for the City and County of San Francisco—an official whose position is created, and salary determined by the local

> charter—shall receive from us, representing the federal government, compensation in addition to what your charter provides, although that charter gives notice to anyone seeking the position of county clerk that the salary therein provided shall be in full payment for all official services rendered of whatsoever nature, and that any fees received shall be the property of the city and county."

That is a matter between the city and county, and its official. He knows when he takes his office that the rule is to govern in the matter of his compensation.

Congress asks the state to perform certain functions in naturalization proceedings. When Congress passed the Act of 1906 it knew what the state law in California was. It knew that there had already been adopted, (in full force and effect January 8, 1900), the San Francisco charter, requiring an accounting by the clerk with the city and county for any naturalization fees he might earn. It knew that the highest court in the state of California had prior to this Act of Congress (in 1902) decided, in the case of *In re Dodge*, 135 Cal. 512, that the charter of San Francisco required county officials to account to the city and county for all fees received, from whatsoever source. This case we shall discuss later.

With this knowledge, then, Congress could, of course, extend to California the right for its state courts to exercise jurisdiction in naturalization. But it did so with full knowledge of the limitations

under which the different state officials would be permitted to act. Congress might accept the aid of the local officials, but it must do so with notice of the local law prohibiting those officials from retaining for their personal use any fees earned. Congress may seek the aid of the state, but it must accept that aid subject to the conditions there existing, or not accept it at all. And, of course, it could not disturb a scheme of things already in existence. It could not break up the frame of government established either in California, or in any other state. Indeed, it is not conceivable to us that Congress ever for an instant had any such purpose in view. It may have intended that the clerks should personally own the fees in those states permitting such an arrangement, but it certainly never intended to infringe upon the order of things established in California before the Act was ever passed.

In answer to this, counsel for plaintiffs in error answer—

First: That the payment of compensation personally to the clerk, is merely exercising the power "to establish a uniform rule of naturalization", as conferred by the federal Constitution.

Second: That if the charter section does prohibit this payment to the clerk, it is unconstitutional as opposed to an Act by a paramount power;

Third: That the charter rule, properly interpreted, is not being violated anyway, because the

clerk is not receiving any additional compensation for any services rendered *in his official capacity as county clerk.*

Concerning the first proposition above, the power given to Congress to make uniform naturalization rules was found necessary in order that one state might not fix a lower standard for citizenship than other states. For by Art. IV, Sec. 2 of the federal Constitution "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; and so, if one was admitted in a state where the requirements were low, he could move to a state where they were high and demand all the rights of a citizen of that state.

Van Dyne, in "Naturalization in the United States", page 6, says:

> "Prior to the establishment of the government under the constitution, the different colonies and states had enacted laws regulating the naturalization of aliens. They had manifested very diverse views in their legislation on the subject. One state, desiring to foster immigration, conferred on foreigners all the rights of citizenship on their landing on its shores, while another required a probation of many years before conferring those privileges upon the immigrant. It was feared that if the states were left to themselves, the same diversity would continue under the Constitution. As early as 1782, Mr. Madison strenuously urged the adoption of a uniform rule of naturalization *by the states.*"

In regard to this first proposition that fixing the compensation of the clerk is exercising the power

to establish a uniform naturalization rule, we desire to note the case of *State v. Libby,* 92 Pac. 350, cited at p. 29 of brief of plaintiffs in error. In that case the Supreme Court of Washington held that the Congressional Act of 1906 fixing the fee for issuing certificates of citizenship, at $2.00, prevails over an Act of the legislature of the state fixing it at $3.00. This, upon the ground that fixing the fee is a portion of the "uniform rule" which Congress has power to make.

But that is by no means the same thing as saying that *determining whether or not the city or the clerk shall retain this fee*—is establishing "a uniform rule of naturalization."

In *Barron County v. Beckwith,* 124 N. W. at 1032, the Supreme Court of Wisconsin, notes this distinction, in discussing this very case of *State v. Libby*

> "Even if it be true, as contended by counsel for appellant, that the power of Congress is exclusive, State ex rel v. Libby, 47 Wash, 481, 92 Pac. 350, and that the state law is superseded as to amount of fees the fees are nevertheless emoluments of the office of clerk within the meaning of the state law" (and so cannot be retained by the clerk).

What the federal constitutional section sought was *equality of conditions for naturalization throughout the different states,* so that A in California and B in Nevada must meet exactly the same conditions, submit to the same educational

tests, etc., and pay the identical fees. One state cannot set a lower standard than another and thus affect the situation in all the states.

For a United States Supreme Court expression that the citizens of one state having same privileges as those of another, if states were allowed to make rules of naturalization, one state might be compelled to admit citizens that it did not want, see Mr. Chief Justice Taney's opinion in *License Cases*, 5 How. at 584-5. See also *Golden v. Prince*, 3 Wash. Circuit Court Rep. at 325ff.

To effect this manifest purpose of the federal Constitution, so far as the fees to be paid by applicants is concerned, Congress provided, in Section 21 of the Act of 1906—

> "That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified."

But these purposes of the constitutional section conferring this power upon Congress to make a uniform rule of naturalization, are in no way defeated by denying to Congress the right to dictate to San Francisco in the matter of the full compensation that shall be received by any official of that city; by insisting upon the clerk living up to the charter section in existence when he took his office, that

> "the salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay *all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county.*"

We shall see later that if Congress is at all handicapped in its naturalization policy, by reason of the above insistence on the rights of local self-government, it is a simple matter to overcome the difficulty.

Counsel for plaintiffs in error recite a long list of benefits to be accorded the different departments of the government by co-operating with the Bureau of Immigration and Naturalization. Among other departments which are so described as looking to the Division of Naturalization for assistance, are the Department of State, in its supervision of foreign relations; the United States Civil Service Commission; the Supervising Inspector General, in the matter of steamboat inspection laws, the General Land Office; the Army, Navy and Marine Corps. As counsel say, at p. 36 of their brief, the county clerks "are convenient and experienced for the purposes of this Act."

Of course, the opinion of the Chief of the Division of Naturalization on the powers of Congress in acting under the Naturalization clause of the Constitution is in no sense controlling on this court.

Counsel reach the conclusion that because the Bureau of Immigration and Naturalization may

be of assistance to many different federal departments, this court should say that, to make the Bureau reach its highest degree of effectiveness, the United States Constitution should be construed as authorizing Congress to determine in naturalization proceedings, what the personal compensation of the county clerk of the City and County of San Francisco, shall be, irrespective of any local laws on the subject.

We have a good illustration of the lengths to which counsel must go in order to follow their theory to its logical end, in one of the instances of assistance to the federal departments thus referred to, at pp. 21-22 of their brief. Quoting from the report of the Bureau of Commerce and Labor for the year 1908

> "Under the steamboat inspection laws, licenses to officers of steam vessels may be issued only to citizens of the United States. The numerous frauds committed against these laws led the Supervising Inspector General, late in the fiscal year to request of this division an investigation of and report upon all certificates of naturalized persons applying for licenses."

No one will question the convenience to the different departments to thus call upon the Bureau for information. But, to us it does not seem possible to seriously contend that for the benefit of the above Supervising Inspector General, the section of the federal Constitution empowering Congress to establish a "uniform rule" in naturalization

can be interpreted to authorize Congress to so interfere in state affairs as to prohibit a state from defining the status between itself and its local officials as to the final disposition of any fees the officials receive from any source whatsoever, when acting by virtue of an office created by the state.

Farmers' National Bank v. Dearing, 91 U. S. 31, is cited at p. 33 of brief of plaintiffs in error to the point that states cannot interfere with federal agencies, except in so far as Congress may permit.

In that case the National Bank Act passed by Congress provided that if any national bank organized under the Act charged more than a prescribed rate of interest, the penalty would be loss of all the interest.

A law of New York provided that the penalty should be loss of the entire debt. Here was a clear case where the federal law, dealing with a subject under the exclusive control of Congress, must prevail, for otherwise that control would have amounted to practically nothing.

We have gone to the debates in the federal Constitutional Convention of 1787 to ascertain whether the members of that convention expressed themselves on the purpose of the provision in the Constitution vesting in Congress the power to make a uniform rule of naturalization. We used the recent scholarly work "*The Records of the Federal Convention of 1787*", edited by Max Farrand, and

a careful examination of these records supports our theory that determining what the personal compensation of the clerk shall be, in the face of local laws requiring an accounting with the county for any fees earned, is not in any sense exercising the powers given Congress to establish a uniform rule in naturalization.

For complete record of the different steps taken in drafting this section of the Constitution see

Farrand, Vol. I, p. 245, sec. 8; 247 sec. 8;
Farrand, Vol. II, p. 144, sec. 11; p. 158, lines 5-6; p. 167, art. 8; p. 182, line 1; p. 569, art. VII, sec 1, clause 3; p. 595, art. I, sec. 8, subd. d.

Roger Sherman was a delegate to the federal Constitutional convention, from Connecticut, was in constant attendance, and was one of the signers of the Constitution. In 1790 he was a member of the House of Representatives, in the first Congress, and on February 3, 1790, he expressed himself on the reasons why the Constitution had vested in Congress the power to fix a uniform rule in naturalization.

In Vol. III of *Farrand* at page 359, appendix a. ccl, we read the following:

"ROGER SHERMAN IN THE HOUSE OF REPRESENTATIVES.

February 3, 1790.

Mr. Sherman thought that the interests of the state where the emigrant intended to reside ought to be consulted, as well as the in-

> terests of the general government. He presumed it was intended by the convention, who framed the Constitution, that Congress should have the power of naturalization, in order to prevent particular States receiving citizens, and forcing them upon others who would not have received them in any other manner. It was therefore meant to guard against an improper mode of naturalization, rather than foreigners should be received upon easier terms than those adopted by the several States."
>
> See Annals of Congress, First Congress, I, 1110.

Certainly the question whether the county clerk of San Francisco shall keep these fees for his own use or turn them over to the city and county treasurer, is of no concern to Congress, within the clear purpose of the framers of the Constitution in giving to Congress power to prevent the evils above suggested.

We, of course, do not argue (as suggested by counsel at page 48 of their brief), that the charter sections direct that the county clerk turn over to the county treasury all the fees collected, including the one-half which is reserved for the United States. The charter does not require any such thing. It concerns itself with the salary of the clerk himself, with what he may receive for his services. Section 34, Art. XVI, which requires him to "pay all moneys coming into his hands as such officer no matter from what source derived or received" into the city and county treasury, starts as follows:

> "*the salaries provided in this charter shall be in full compensation for all services rendered.*"

This indicates the purpose of the section. And Art. III, Chap. III, Sec. 2, reads:

> "Salaried officers shall not accept any fee, payment, or compensation directly or indirectly, *for any services performed by them in their official capacity*, nor any fee, payment or compensation, *for any official service performed* by any of their deputies. * * * No deputy * * * shall receive or accept any fee, compensation or payment *other than his salary* as now or hereafter fixed by law, *for any work or service performed by him of any official nature, or under color of office*, whether performed during or after official business hours."

This section clearly refers to the money that the clerk would receive for himself. And so with the other charter provisions.

The city and county could have no control over money that belongs to the United States government.

What we have already said serves as an answer to the second above claim, that if we construe the charter sections as prohibiting this extra compensation, they are unconstitutional as being opposed to the greater power of Congress.

We know of no rule of law which sustains the statement found at page 43 of brief of plaintiffs in error, that "it is, also, inferable that if these

persons are deprived of compensation there will be shirking, indifference and neglect." (i. e. of compensation additional to their regular salary.)

But let us imagine that Congress will discover that in counties which have the understanding between the county and the clerk that the fees belong to the county, the clerks are so poorly compensated as to be discouraged in the efficient performance of the naturalization duties. Would that mean as suggested by counsel, that Congress could claim the power to determine what he should do with those fees that he is allowed to retain? There is absolutely no need, from the standpoint of the objects of Congress, to so interpret the federal constitutional section on naturalization as to permit of any such extreme interference with a purely local matter. For all Congress would have to do, to carry out the intent of that constitutional section, (interpreting that intent as do counsel for plaintiffs in error,) would be to provide another agent, strictly federal, to perform these clerical duties and pay him as large a salary as Congress may be pleased to provide. This agent could perform these clerical duties, and the state courts could retain their jurisdiction under the Act of 1906. For instance, the Bureau of Immigration and Naturalization, might be authorized to appoint its own personal agent to exercise these clerical functions, in every county in the state.

If the clerks must be personally compensated in order to make the Act workable, why not the judges too? They have important duties to perform. The argument of counsel must lead to the conclusion that if Congress sees fit, it may provide extra compensation for the judges. Again, Congress might determine that certain office hours should be kept, and certain locations for offices established, and this might conflict with local laws.

The Act certainly will not "go to pieces" as suggested by counsel at page 47 of their brief, simply because the clerks may be compelled in some counties to account to the county for the fees earned. But if this element of personal compensation really is a "part of the machinery" created by Congress, which is absolutely necessary to the successful working of the mechanism, Congress may appoint its own agents in its own way. It cannot build up this mechanism and include as a necessary cog therein a state or county official without the permission of the state or county. The City and County of San Francisco also, has its governmental machine, and it is not for Congress to say that that mechanism shall not "work as designed and turned out by its maker."

Having such a simple solution of any possible problems as suggested in the brief of counsel for plaintiffs in error, we respectfully submit that, to subscribe to the doctrine that Congress can dictate to San Francisco as to the compensation that

her county clerk is to receive would be to countenance a most dangerous and wholly unnecessary invasion upon the rights of the states.

Taking up the third suggestion of counsel that the county clerk does not in naturalization proceedings, act in his "official capacity," as contemplated in the charter, and that therefore the charter provisions requiring him to turn in all fees to the city and county treasury are not applicable.

The interpretation placed by the California courts on the San Francisco charter is a conclusive answer to this argument. For this court will not disturb such a construction of a state statute made by the court of last resort in the state.

In *Elmendorf v. Taylor et al.*, 10 Wheat. 152, 6 L. Ed. 289, at 292, column 2, Mr. Chief Justice Marshall has expressed, in language which has become the basis of the treatises in dealing with this subject, the rule that the U. S. Supreme Court will look to the state courts for the proper interpretation of state statutes.

> "This court has uniformly professed its disposition in cases depending upon the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed

by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

"And this is true, although the federal court may be of the opinion that the construction by the state court is improper."

4 Enc. of U. S. Supreme Court Reports, pp. 1066-67.

See

Lewis' Sutherland Statutory Construction, Vol. II, Sec. 314; also, Sec. 22, p. 39.

The District Court of Appeal of the State of California very succinctly said, in this case (Trans. page 20, fols. 42-43-44; page 21, fol. 44):

"The money came into the hands of Mulcrevy as such clerk although the source from which it was derived and received was the amounts paid to him as fees in naturalization

proceedings as prescribed and provided for in the act of Congress; and it was his duty to pay it into the treasury of the city and county. Language could not be more explicit. It does not admit of doubt or quibble as to its meaning. 'No matter from what source derived' means all the money coming into his hands by virtue of and by reason of his being such county clerk and ex-officio clerk of the Superior Court. It was by reason of his election as county clerk and his taking office and giving his bond, and receiving a salary of $4000 per annum, that he was enabled to receive the fees for naturalization proceedings in the Superior Court. He received them in his official capacity. He was ex-officio clerk of the Superior Court in which the fees were collected under the provisions of the act of Congress. * * * It was his duty to receive and file complaints, answers, pleadings, petitions in probate, and to perform all services required of him, for which he received fees. It was his duty to perform all services required of him by the laws of the state at the time he took office, and all services that might be required of him by any subsequent law of the state enacted after his accession to office. Such fees were not his, but belonged to the city and county, he being in one sense the agent of the city and county in collecting such fees. It was equally his duty to perform services in naturalization proceednge after the passage of the law subsequently enacted by Congress, and to receive fees for such services, but the fees when so received belonged to the City and County of San Francisco. It was not for him to say that the services were performed under the authority of the United States, and not under the authority of the state. His bond contained the condition that he would faithfully perform all official duty that might there-

> after be imposed upon him by law. The Act of Congress was a law."

In the case of *Matter of Dodge*, 135 Cal. 512, the Supreme Court of California, had the same charter sections under consideration, in a case very similar to this case. Dodge was assessor of the City and County of San Francisco. The charter fixed his salary at $4000 per annum, "which shall be in full compensation for all his services".

The state law provided that "The assessor for services rendered in the collection of poll taxes shall receive the sum of fifteen per cent" of the amount collected. This was to be paid by the state, and would cost the city nothing. The question was whether the charter or the state law controlled in this matter of compensation for services rendered in his official capacity as assessor, for the state, and not for the city and county.

After quoting the constitutional authorization, which we have noted, for the city and county to provide in its charter for the compensation of the several county officers, the court said, at page 515:

> "The charter for the government of the consolidated city and county of San Francisco, adopted January 26, 1899, contains provisions for the election and terms of officers under the same, and fixes their compensation, in pursuance of section 8½ of article XI of the constitution. It is provided in said charter, under the chapter with reference to the assessor, that, 'He shall receive an annual salary of $4000, which shall be in full compensation

for all his services.' Provision is made in the same chapter for the appointment of the necessary clerks and deputies to assist the assessor in the discharge of his duties, prescribing a fixed salary in each case to compensate them for their services."

Then Section 34 of Article XVI of the charter is referred to, as follows:

"For the purpose, as it would appear, of removing all doubt, it is provided, under the article on miscellaneous subjects (sec. 34): 'The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county within twenty-four hours after receipt of the same.'

"It is claimed, however, on the part of the respondent that the duty of the assessor, as provided in the charter, is merely to assess taxable property within the city and county, and that the collection of the poll-tax is not a part of his duty as such assessor. But the poll-tax is collected by him in his official capacity as assessor, and for all of his services as assessor he is fully compensated by way of a fixed salary, and is expressly required to pay 'all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county'."

At pages 516-517:

"It is clear that it was intended that the salaries should be in full for all official services of every kind whatever, and that the officer is not entitled to retain to himself any fees or

> perquisites for the performance of official duty. Such fees or perquisites, if any received, belong to the public corporate body that employs him."

The Dodge case is not so strong in its facts from the standpoint of defendant in error as is this case. The state legislature, in the matter of the salaries of county officers, is superior to Congress. Were it not for the giving up of control, by the state, in Section 8½ of Article XI of the state Constitution, the state legislature would have controlled on the question of the assessor retaining for his own use this percentage of poll taxes collected. But Congress has only such powers as are conferred upon it. So, it is inherently a weaker body than is the state legislature, in the determination of the compensation of county officials.

And so, in the Dodge case we again have an interpretation of these charter sections, by the highest court in California, which serves as the positive answer to the argument of counsel for plaintiffs in error on the meaning of the charter requirement for an accounting with the city and county for fees received in an official capacity.

At page 38 of brief of plaintiffs in error it is said:

> "The matter of Dodge is, as authority in this case, in every way analogous to the case of Finley v. Territory proffered as authority in Eldredge v. Salt Lake County, supra, and there clearly shown to be inapplicable."

We cannot follow the reasoning of counsel. The Utah court distinguishes the Finley case on the

ground that by an Act of Congress approving certain laws of the Territory of Oklahoma, a probate judge in Oklahoma was required to perform certain functions for a certain salary, and that the intent of this Act was clearly to that effect. That is, there was no conflict between the Act of Congress and the laws of Oklahoma.

But in the Dodge case the court assumes a conflict to exist between the legislative enactment and the San Francisco charter; and the California Supreme Court held that the charter controlled.

At page 10 of their brief counsel for plaintiffs in error say that "the offices of county clerk and clerk of court are distinct in legal concept", and cite the case of *People v. Anderson,* 20 Cal. 94.

All that case held was that if a state law determines that a county clerk is ex officio county recorder, that the two offices, nevertheless, are distinct offices. This, of course, is good law. But there is no such office, in San Francisco, as "clerk of court", separate and distinct from county clerk. The only office in existence is county clerk, and one of the duties of that official is to act as clerk to the court.

In *Claflin v. Houseman,* 23 Law Ed. 833, the U. S. Supreme Court, speaking through Mr. Justice Bradley, gives an excellent discussion of the concurrent jurisdiction of federal and state courts. The court holds that under the Bankruptcy Act of 1867 the assignee might sue in the state courts to recover the assets of the bankrupt, no exclusive

jurisdiction being given to the courts of the United States; that Congress could have given exclusive jurisdiction to federal courts had it wanted to, but not doing so, state courts may exercise jurisdiction if they are given it, either by Congress or by the states themselves.

At page 839 the Court says:

> "So with regard to naturalization, a subject necessarily within the exclusive regulation of Congress, the first Act on the subject, passed in 1790, and all the subsequent Acts, give plenary jurisdiction to the State Courts. The language of the Act of 1790, is, 'Any common law court of record in any one of the states,' etc. 1 Stat. at L. 103. The Act of 1802 designates 'The Supreme Superior, District or Circuit Court of some one of the States or of the Territorial Districts of the United States, or a Circuit or District Court of the United States.' 2 Stat. at L. 153."

There is no doubt, then, under the rule thus expressed by the United States Supreme Court, that our state courts have concurrent jurisdiction with the United States courts, *from the power bestowed by the State of California*, as well as from that bestowed by Congress. The clerk therefore acts strictly in his capacity as county clerk.

> *United States v. Severino*, 125 Fed. 949, at 950.

The above case was a decision to the effect that a perjury committed in violation of the naturalization act was properly punishable in the courts of a state. The decision reviews some of the authori-

ties in support of the doctrine that the state court is no more than the agent of the federal government in naturalization matters and rejects that theory. The court says:

> "There is another view, to the effect that the courts entertaining naturalization proceedings remain courts of the state, so that persons committing perjury in such proceedings may be punished under the laws of the state, although it is neither denied nor affirmed that such persons could be punished also under the laws of the United States. This view is illustrated by the decisions of Rump v. Commonwealth, 30 Pa. 475 (1858); State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196 (1870); and these decisions are expressly approved in the opinion in In re Loney, 134 U. S. 372, 376, 10 Sup. Ct. 584, 586, 33 L. Ed. 949, where it is said:
>
> "'The decisions in the Supreme Court of Pennsylvania and of New Hampshire, cited, for the appellant, holding that the judiciary of a state has jurisdiction of perjury committed in a proceeding for naturalization before a Court of the state, under authority of Congress, tend rather to support than to oppose our conclusion; for they were put upon the ground that the proceeding for naturalization was a judicial proceeding in a court of the state, as it doubtless was. Rump v. Commonwealth, 30 Pa. 475; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Spratt v. Spratt, 4 Pet. 393, 408, 7 L. Ed. 897.'
>
> "According to this view, the state court, while entertaining such proceedings, remains a part of the sovereignty which created it, and does not become a federal court."

The case of *In re Loney*, 134 U. S. 372, quoted above, is an unqualified holding that a naturalization matter is a 'judicial proceeding in the court of the state'. That was a case in which a false affidavit was made before a notary public appointed by the governor of the state, in the matter of a contested election of a member of Congress. It was held that the *federal courts had exclusive jurisdiction* of the perjury. The same case holds that *state courts* have jurisdiction of a perjury committed in a naturalization proceeding therein.

The only ground for the distinction made in that case was, that the matter of a contested election to Congress was one over which the federal courts had jurisdiction of the proceeding itself and that a naturalization proceeding, on the contrary, lay within the jurisdiction of the state courts, when prosecuted therein.

In *Spratt v. Spratt*, 4 Pet. 393, 7 L. Ed. 897, Mr. Chief Justice Marshall, at page 906, column 2, says of naturalization proceedings:

> "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and like every other judgment, to be complete evidence of its own validity."

Granting counsel's argument that naturalization is not, *necessarily*, a judicial function, to be exercised by the courts, it has been made so by the Act of 1906.

> "In the United States naturalization is a judicial function, having been committed by Congress to the courts", etc.
>
> *Van Dyne on "Naturalization in the United States,"* p. 9, ff.

That naturalization is a function of the court and not of the clerk, see *Van Dyne*, p. 19.

See *Van Dyne*, pp. 17-19 for a discussion of cases on the point that courts act as state courts.

See:

In re Bodek, 63 Fed. at 814;
Charles Green's Son v. Salas, 31 Fed. 106;
In re Peter Coleman, 15 Blatch (U. S. Circuit Court) at 420;
Prentice v. Miller, 82 Cal. at 575.

We have seen that the Constitution of the State of California, since its adoption in 1879, has vested in the Superior Courts of the state power to exercise naturalization jurisdiction; also that the same authorization is incorporated in the statutes of California.

The Act of Congress of 1906 confers the same jurisdiction upon the Superior Courts of California, as well as upon the federal courts. California, then, has consented to act as authorized by Congress. The federal and the state courts have

concurrent jurisdiction, that of the state courts being conferred both by Congress and by the state.

It makes no difference whether we consider the jurisdiction as conferred by the Act of Congress, or by the state, or by both. Assuming that it is conferred by the Act of Congress, and that the state constitutional provision merely amounts to the state's consent, the clerk is still a clerk of the state court. By virtue of the fact that Congress so confers jurisdiction and that the state so consents to its exercise, the clerk is permitted to perform certain duties which are prescribed in the federal statute. There is no power in Congress to compel the work to be done by the clerk of our Superior Court. In fact, the statute does not assume to so compel action by the clerk. Section 12 prescribes "that it is hereby made the duty of the clerk of each and every court *exercising jurisdiction in naturalization matters under the provisions of this act to keep and file*, etc., etc." These duties are incumbent only upon such clerks as do act under the statute. If the clerk does this work he is acting in his official capacity.

Section 4 of the Act requires the alien to make his declaration on oath, before the "clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy." And Section 3 confers jurisdiction on "all courts of record in any state or territory, now existing, or which may hereafter be created, having a seal, a clerk and jurisdic-

tion in actions at law or equity, or law and equity in which the amount in controversy is unlimited".

Certainly Mulcrevy, an officer of the City and County of San Francisco, was, under that section of the statute, acting in an official capacity, sufficiently to come within the general language of Section 34 of the miscellaneous provisions of the charter, which requires "every officer" to "pay all moneys coming into his hands as such officer, *no matter from what source derived or received,* into the treasury of the city and county. * * *"

The Supreme Court of Washington in *Franklin County v. Barnes,* supra, after discussing the question of interpretation of the federal Act, goes on to say that the naturalization clause of the United States Constitution vesting power in Congress to fix a "uniform rule" should not in any event be so interpreted as to empower Congress to override the determination by a state that county clerks shall receive only a certain compensation for all official services.

At page 781, column 2, and page 782, the court says:

> "It is argued that the duties of the clerks in naturalization proceedings are outside of their duties as clerks, and that, therefore, the disposition of the fees as well as the fixing of their amount is within the power granted to the general government. We are not called upon to determine the extent of the power granted to Congress, but only the extent to which it has exercised that power. From what we have said we think it plain that there was

> no intention by the act in question to make a final disposition of the half of the fees relinquished by Congress, but only to provide a basis of accounting for the fees collected as between the clerk and the bureau. But aside from this, which we conceive to be a sufficient answer, we think the argument proceeds upon an unsound assumption. Both on reason and authority we hold that, where fees are paid to a county clerk, clerk of a state court, or other state or county officer for services performed under a federal statute, that officer receives the money by virtue of the office created by the state law. The clerk acts in an official, not a personal, capacity. The certificate issued is an official, not a personal document. * * * The clerk is designated by the act of Congress to receive the fees because he is clerk of the court designated by the act to naturalize aliens. It was the office which was in the legislative mind not the individual. It was the clerk as clerk."

After citing the decision by the California court in this case, and of the Wisconsin Supreme Court in *Barron County v. Beckwith,* the court says at page 782, column 2:

> "The reasoning of the Supreme Courts of Wisconsin and California in the cases quoted appeals to us as sound, and, in view of the further consideration that there is no necessary conflict between the state and federal statute, we are impelled to the same conclusion reached by those courts. * * * The disposition of these fees is a question between the clerk and the state. The clerk derives his office from the state. He takes the office upon the condition that he pay into the county treasury all

fees collected by virtue of that office. This is a matter with which the federal government has no concern."

In *Barron County v. Beckwith,* 124 N. W., at 1032, the Wisconsin Supreme Court says, of the character of services performed by clerks of the court, under the recent Naturalization Act:

"The naturalization proceedings are proceedings in court and the clerk in performance of services therein acts in his official capacity as clerk of the court. The Act of Congress purports to confer jurisdiction to naturalize aliens on all courts of record in any state, and the courts of record in this state have acted in their official capacity in such proceedings before and since the Act of Congress. That the circuit courts of the state have jurisdiction to naturalize aliens is beyond question. This is not denied by counsel for appellant, but it is argued that the jurisdiction is limited or quasi judicial in its nature, and that Congress might designate the board of aldermen of cities to determine the requisite facts to entitle to citizenship under the conditions prescribed by law. Whether Congress could have conferred the power on other bodies than courts of record we need not determine. It is sufficient that it has authorized courts to perform the function and provided the fees to be received by clerks of courts in that regard. The courts having assumed to act have the right to do so in the absence of any law of the state prohibiting such action."

In *Rhea v. Board of County Comrs.,* 88 Pac. 89, the Supreme Court of Idaho held that where the state constitution provided that all county officers

shall receive fixed annual salaries, and that all fees which may come into their hands shall be paid into the county treasury, and an Act of Congress authorized the clerk of the court to take oath, etc., by applicants under the land laws of the United States, and specified fees that the clerk should charge, that these fees must be turned into the county treasury.

At page 90, column 2, the court says:

> "If the clerk of the court and probate judge of Washington County, had not held those offices, they could not and would not have received the fees referred to."

The above Idaho case is quite as strong as the Washington, Wisconsin and California naturalization cases, for the rule that an Act of Congress dealing with a subject over which Congress has exclusive control (the public lands), cannot affect a state provision requiring an accounting to the state, or to a county thereof, for fees received by the clerk of the state court, exercising functions authorized by the federal government, for the benefit of that government, in land proceedings.

Counsel for plaintiffs in error quote at page 18 of their brief, the language of the United States District Court, in *United States v. Van Leuven*, 62 Fed., at 66:

> "A person may act in an official capacity because he is an officer lawfully appointed and qualified, and acts as such, or he may act in an official capacity because he lawfully performs duties which are of an official character."

In that case, a federal statute prohibited the receiving of money, for influencing his decision on any question before him, by

> "every officer of the United States, and every person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof".

The point decided was that though a member of a board of examining surgeons appointed by the commissioner of pensions, was not an "officer of the United States", he was a "person acting for or on behalf of the United States," "in an official capacity", and "under or by virtue of the authority of an officer of the government", under the terms of this Act. The basis of the distinction between federal "officers" and those acting "in an official capacity", is shown to be the provision of Art. II, Sec. 2, of the United States Constitution, which defines "officers" as those appointed by the president, by courts of law, or by the heads of departments, and it is held that the Commissioner of Pensions was not such a "head of a department."

The inference which counsel for plaintiffs in error draw, at page 18 and at page 48 of their brief, is that Mulcrevy acts in an official capacity, "because he lawfully performs duties which are of an official character"; and not because "he is an officer lawfully appointed and qualified."

The answer to this argument is obvious. First, there is no question in our case, as there was under the United States Constitution in the Van Leuven case, that Mulcrevy is "*an officer* lawfully appointed and qualified."

Second, if he were not such an "officer lawfully appointed and qualified" he could not, under the terms of the Act of Congress itself, perform naturalization duties.

Third, if we look only to the other suggested definition of his official capacity (his performance of "duties which are of an official character") we have seen that the San Francisco charter requires an accounting with the city and county, for fees so earned. The highest court of the state has so construed the charter. This court will not question that construction.

Counsel for plaintiff in error say, at pages 18 and 36 of their brief, that all that a clerk of a state court has by virtue of the laws of his state is the personal qualification, i. e., incumbency in the office of clerk of court; that "all his other qualifications and all his authority he has from the act itself."

But there are no "other qualifications". All that the Act requires is that the person have such qualifications as are required by the state, so that he may fill the position of clerk of court. As to "all his authority coming from the Act itself", we have seen that in California, authority to natu-

ralize is vested in the state courts by the state as well as by Congress. Therefore the clerk of the court is so authorized by state, as well as by federal action, though, of course, the rules prescribed in the Act, within the power of Congress to fix, must be complied with.

United States v. Hill, 120 U. S. 169; 30 L. Ed., p. 627, cited at pp. 20, 35 of brief of plaintiffs in error, is not in point. For the court there construed an Act of Congress requiring accounting for fees as not intended to apply to naturalization fees, received by the clerk of a federal court, which fees were not fixed by any law. Further, that the clerk was not acting as clerk, but in his personal capacity. He was appointed by rule of the court.

> "It is for services rendered under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. *They could as well have been performed by any other person designated by the court for the purpose: as by the district attorney, or a commissioner of the circuit court, or an attorney, or any suitable person not an officer of the court*" (30 L. Ed., p. 631, column 1).

The other cases cited at page 35 of brief of plaintiffs in error, *Hill v. United States*, 40 Fed. 441, and *U. S. v. McMillan*, 165 U. S. 506, are distinguishable for the same reasons.

It is agreed by all the courts and evidently conceded by plaintiffs in error, that Congress cannot

compel the state courts, against the will of the state, to entertain naturalization jurisdiction.

In *Claflin v. Houseman,* 23 L. Ed. 833, supra, this court explains that in such a matter as naturalization, the state courts have concurrent jurisdiction with the federal courts, even in the absence of congressional authorization, if permitted by the state constitution, and not prohibited by Congress. Then, at page 840, column 1, the court says:

> "It is true that the state courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general arguments."

In the Massachusetts case of *Inhabitants of Hampden County v. Morris,* 93 N. E. 579 (cited in brief of plaintiff in error at pages 15, 32, 39), the Supreme Judicial Court of Massachusetts assumes that Congress cannot compel the state courts to exercise naturalization jurisdiction. In 93 N. E. at page 580, columns 1 and 2, the court says:

> "If we assume that Congress could not compel the courts of a state to take jurisdiction of matters in regard to which the federal government has the exclusive right to legislate (see *Kentucky v. Dennison,* 24 How. 66-107, 16 L. Ed. 717; *Ex Parte Virginia,* 100 U. S. 339, 348; 25 L. Ed. 676; *Stephens, Petitioner,* 4 Gray, 559-562), there is no doubt that such courts, at least with the consent of the legislature of the state, may exercise this jurisdiction if it is conferred upon them by a law of the United States."

And at page 581, column 1:

> "We assume that they (the state courts) may decline to exercise it at all: * * *"

In the Oregon case of *Fields v. Multnomah County,* 128 Pac. at 1047 (brief of plaintiffs in error, pages 15, 32, 39), the Supreme Court of Oregon says of the Act of Congress of 1906:

> "It is not attempted to compel the state courts to exercise the power given."

The Utah court acts on the same assumption, in the Eldredge case.

Willoughby on the Constitution, Vol. 1, page 282:

> "Congress by statute determines the courts which shall exercise the right to naturalize, and to such courts the function is exclusively confined. Congress may authorize, and for many years, has authorized, state courts to entertain naturalization proceedings, but there is, of course, no power on the part of the federal government to compel the exercise by such state courts of the power so granted."

Cyc., Vol. 2, page 111.

> "Though Congress may authorize state courts to naturalize aliens, and state courts, under such authority, may do so, a state is under no constitutional obligation to furnish tribunals to aid in the administration of the naturalization laws of Congress, *and hence may prescribe limitations upon the exercise, by its courts, of jurisdiction in such matters,* or even altogether prohibit its courts from entertaining jurisdiction" (citing several cases).

Let us assume that, in the opinion of the people of the State of California, the performance of naturalization duties by the state courts and clerks would seriously cripple the performance of the other duties required of them. The state might direct that the county clerk shall not act in naturalization matters at all. If it can do this, it can also direct that if he do act, he shall not retain any of the fees. And this the state has authorized the people of San Francisco to command.

To say, as do counsel for plaintiff in error, that if the state court and the clerks thereof accept jurisdiction under the federal Act, they must accept every condition in that Act, is an illogical statement. They must accept only those terms which Congress has the constitutional right to include. The argument that in accepting the Act the state must subscribe to every thing in the Act, is based on an assumption that Congress has the power to declare that Mulcrevy is to keep these fees for his personal use. Accepting their interpretation of the Act, this is the very power that counsel for plaintiffs in error must prove to be vested in Congress.

The situation with reference to the respective powers of the federal and the state governments in requiring or authorizing services of a county clerk in naturalization proceedings may be thus summarized.

The federal government may say:

> "If your state, or the local subdivisions thereof, will permit of your so acting, we authorize you to act in naturalization proceedings as specified in the law of Congress, in so far as it is in harmony with the United States Constitution. We have notice of the laws of your state requiring the clerk to account to the county for fees earned. We know, then, that we must accept the services of your clerks, under the terms and limitations applying thereto which we find in existence when we pass the law authorizing them to act. For we cannot go into your state and disorganize the governmental arrangement which you have created."

The state says:

> "Congress having authorized you to act in these proceedings in a certain way specified by the Constitution and the Act of Congress, we hereby give you permission to exercise the duties so described, while serving in your official capacity as county clerk, on condition that you comply with the law of the state of which Congress had notice when it passed the Act, and of which you had notice when you accepted your office; i.e., you must account to the City and County of San Francisco for the fees earned."

A RESTATEMENT OF OUR POSITION ON THE CAPACITY IN WHICH THE CLERK ACTS IN NATURALIZATION PROCEEDINGS.

First. It may be positively stated, after a careful reading of the many theories advanced in the

different cases, that Congress has the power to confer naturalization jurisdiction on state courts.

Second. It is not necessary for us to go into the academic question, interesting though it may be, discussed by the California Supreme Court in the early case of *Ex Parte Knowles,* 5 Cal. 300 (page 30, brief of plaintiffs in error), as to whether the actual conferring of jurisdiction upon state courts must come from Congress or from the state. We agree with counsel that Congress has the power to confer this jurisdiction on the state courts.

Third. Congress cannot compel the state courts to assume such jurisdiction. It is optional with the states to accept or refuse the privilege thus extended by Congress.

Fourth. California having accepted this jurisdiction, and in its Constitution and statutes authorized its courts to act, we have such authorization from two sources, the United States and the state. The uniform rule fixed by Congress, so far as it is in fact a "uniform rule" within the letter and spirit of the federal Constitution, must be complied with by the state.

Then, the theoretical question remains, which has been discussed from different viewpoints, what character of functions does the state court perform in naturalization proceedings?

We do not believe that an answer to this question is of any considerable importance in our case.

But, since it has been so extensively discussed in the different cases, and in the brief of plaintiffs in error, we will here note the different views, as relevant to this case.

First: It is in many cases and in the text books asserted that this is strictly the exercise of a judicial function by the court as a state court. If that be the case, then the county clerk of the City and County of San Francisco is, of course, acting in his official capacity as such, as a regular officer of the court, and the fees received in such capacity, are directed by the San Francisco charter to be turned over to the city and county.

Second: It is suggested in some of the cases that since Congress has no power, under the United States Constitution to confer judicial powers on any court other than those created by Congress; and since there is no question of the power of Congress to confer powers in naturalization on state courts, that we must not consider this as the exercise of strict judicial functions, but rather, as a power incidental to the usual jurisdiction of the court. Also, the suggestion is made that the state has no power to impose duties in naturalization upon a state official as such; that Congress alone has power to prescribe these duties; but that the state undoubtedly has the right to give its consent to the clerk's so acting, and therefore, the state's attitude is a material element; and so again, it must be material only in the sense that

the clerk as a personal agent of the federal government and not as a county clerk is permitted to assume these duties. Counsel for plaintiffs in error therefore attempt to sustain the position that the clerk is not acting in his official capacity, as contemplated in the charter sections requiring an accounting for fees to the city and county; but is a mere personal agent of the federal government, and may be paid for his services as that government sees fit to pay him.

We respectfully submit that the conclusive answer to this argument is three-fold (and this disposes of the second assignment of error, at page 7 of brief of counsel for plaintiffs in error):

First: The court of last resort in California has construed these charter sections as requiring an accounting with the city and county, and this court will not go behind such a construction of a state statute.

Counsel for plaintiffs in error attempt, in division number VI of their argument (pages 9 and 47-48 of brief), to show that there is no conflict between the Act of Congress and the charter, because the charter provisions were not intended to apply to naturalization fees. The conclusive interpretation of the California Supreme Court disposes of that argument. We, on the other hand, claim that there is no conflict because the Act of Congress should not be interpreted as meaning that the clerk must personally own the fees.

Second: The theory as to lack of power in Congress to confer judicial functions on state tribunals has no application to a situation where the state itself confers jurisdiction, and California has so authorized its courts to exercise naturalization jurisdiction; and, Congress not prohibiting it, there is no question that the state has the authority to confer naturalization jurisdiction on its courts. The courts, then, so far at least as the jurisdiction is conferred by the state, act in a judicial capacity.

Third: If it be granted that in naturalizing an alien, the court is not acting in a judicial capacity, this would have no bearing upon our question. For the court certainly is acting in *some* official capacity, by reason of authorization given both by Congress, and by the state. The county clerk then, acts by reason of his official capacity as clerk of the court. The law does not say that Harry I. Mulcrevy, or any other individual, shall act. The law does not designate Mulcrevy or any other person, nor does it delegate, as it might have done, to any board or officer the power to appoint any one as the personal agent of the government. It does provide that the clerk, whoever he may be, by reason of the fact that he is clerk, and for no other reason, shall act. The reason is apparent. Congress wanted to make use of the regularly constituted machinery of the state court. It desired that a certain county official of the City and County of San Francisco, by virtue of the fact that he

is such an official, should exercise certain powers. And so, he is certainly acting in his official capacity, and therefore is included within the scope of the charter sections, no matter whether we consider the functions of the court as judicial, quasi-judicial, or purely administrative.

That is, admitting the theory that Mulcrevy is merely a federal administrative agent, the highest court in California has said that the sections of the San Francisco charter mean that any county official, acting as such a federal administrative agent, must account to the city and county for any fees received. This interpretation is final.

If Congress desires a mere personal agent, to be paid whatever Congress may determine, it can appoint any person it desires. But Congress cannot say to the state:

> "we intend to take up the time of one of your officials, have him perform work for the federal government, and even though you say that if your official so devotes any time for the benefit of the United States he must turn over any fees earned to the city and county, we insist that he shall not do so."

For if Congress requires the services of the county clerk, it is asking the state, or the City and County of San Francisco, to permit one of its officials to devote a certain amount of time and energy in the performance of duties which Congress desires performed. The city and county, then, under authorization from the state, can prescribe

a condition precedent that any fees received shall belong to the city and county. As a matter of fact the state and county permit time of the state and county to be taken up for the benefit of the federal government, and they certainly have the right to insist that the state or county as such be compensated for this service. Counsel say (page 44 of brief), "a superior who may not control the compensation of one whose services he would have, is not a full superior." The "full superior", so far as compensation is concerned, is the city and county; just as Congress is, with reference to the amount of fees to be charged.

This is made clear if we reverse the situation and imagine that the state, acting under some provision of its Constitution, and in an attempt to put into practical operation the purpose thereof, had authorized the clerk of the United States District Court to perform certain functions which naturally come within the scope of his work. Congress might prohibit such work by the clerk. But also, it might give its permission. Can there be any question that Congress might at the same time direct that the clerk should account to the United States for any fees he might earn while so acting in his official capacity?

The California appellate court notes that Mulcrevy's bond contained the condition that he would faithfully perform all official duties that might thereafter be imposed upon him by law; and that

therefore it was not for Mulcrevy to say that the services were performed under the authority of the United States and not under the authority of the state. In referring to the above, counsel for plaintiffs in error, at page 46 of their brief, say:

> "A condition in an official bond cannot override an Act of Congress; the bond is of no greater force than are the laws under which it is given. The Act of Congress does not, moreover, impose any official duty within the meaning of the bond."

The bond does not attempt to "override an Act of Congress". On the contrary, it is of material aid to the successful enforcement of the Act of Congress. For the federal government might recover on Mulcrevy's bond for his failure to properly enforce the Act. And the Act of Congress does impose official duties on the clerk, within the meaning of the bond, as the statutes requiring the bond are construed by the highest court in California.

The extremes to which the reasoning of counsel for plaintiffs in error has led them is well instanced in their contention (pages 41-2, 44-6, of brief) that under the terms of the Act Mulcrevy may employ whom he pleases as assistant clerks for naturalization purposes, and discharge them as he pleases. In other words, that the civil service provisions, as well as the salary provisions, of the San Francisco charter, may be swept away by an Act of Congress.

Article XIII is the civil service article of the charter. It provides for a classification of civil service positions throughout the city and county; for the creation of eligible lists, by examination, for positions in the different offices of the city and county; for appointment to positions from these lists; and that no one can be removed from such a position except for cause, upon written charges, and after an opportunity to be heard in his own defense.

Section 11, subdivision a, as amended in 1913, provides that

> "the provisions of this article shall apply to the following offices and departments of the city and county: The county clerk * * *"

The charter has always included the county clerk's office as subject to civil service.

The time of the clerk is taken up; his headquarters, built and paid for by the city and county, are used; and still counsel contend that the city and county is to have nothing to say as to the salary or qualifications of the assistants who make use of these quarters so built by the city.

Counsel say, at page 45 of their brief, that

> "the appointment of clerks and the payment of money out of the county treasury for the naturalization of aliens as citizens of the United States, is not a function of the municipal government, and is not in any way provided for in the charter."

The above language is used in connection with their argument that Section 35 of Art. XVI of the charter (cited in brief of counsel at page 45, erroneously as Art. XV) does not authorize the supervisors to create extra positions for such work.

We insist that counsel are clearly in error. If the city and county, being so authorized by the state, consents to act in these naturalization proceedings, then, certainly, it can create any extra positions which might be necessary. It is acting, not only by authorization of Congress, but by that of the state itself, and is, in a sense, complying with the state's desires. And even if we consider the national government alone as being served, a power in the local government to thus serve the United States, includes a power to furnish the necessary means for this service. If San Francisco can permit its county clerk, paid by the city, to do this work, it can also permit the assistants to the county clerk, paid by the city, to do the same work.

VI.

AN ANALYSIS OF THE FIVE CASES CITED BY PLAINTIFFS IN ERROR SHOWS THAT ONLY ONE IS IN POINT—AS AGAINST THREE NATURALIZATION CASES AND ONE OTHER PARALLEL CASE WHICH SUSTAIN THE POSITION OF DEFENDANT IN ERROR.

Eldredge v. Salt Lake County, 106 Pac. 939 (brief of plaintiffs in error, pages 15, 16, 32-4, 38).

In this case the state law considered by the Supreme Court of Utah did not require, as does the charter of San Francisco, the turning over to the county treasury of naturalization fees provided for in the federal law.

The court says, page 940:

"By Section 1 of Article 21 of the Constitution of this state it is, among other things, provided that 'all city, district, state, county, town and school officers * * * shall be paid fixed and definite salaries.' By the section following the foregoing it is, in substance, provided that *the legislature shall by law provide the fees which shall be collected by the officers referred to in the preceding section*, and that all such officers 'shall be required by law to keep a true and correct account of all fees collected by them, and to pay the same into the proper treasury, and the officer whose duty it is to collect such fees shall be held responsible on his bond for the same.' Pursuant to the foregoing provisions, *the legislature, from time to time, has passed certain Acts in which the fees for the services rendered by the different officers mentioned in the Constitution, including appellant, are fixed. The law also provides that the fees collected by the county officers, including appellant, shall be paid into the county treasury monthly.* Among other things provided for by the section of the statute which applies to appellant, and which he, before the Act of Congress aforesaid was in force, was required to collect and account for, are the following items: 'For declaration of intention to become a citizen of the United States, $2.00; for final citizenship certificate, $3.00.' By Section 2057, Comp. Laws 1907, the maximum amount of what appellant's salary may be is

> fixed, and by Section 2062 the salary allowed constituted full compensation for all official services rendered by appellant."

The exact language of Section 2 of Article 21 of the Constitution of Utah, above referred to, is:

> "The legislature shall provide by law, the fees which shall be collected by all officers within the state."

And then, that they shall pay the same into the treasury, as above.

Section 2057 (Comp. Laws 1907), above referred to, provides:

> "The salaries of the officers of all counties in the state shall be fixed by the respective boards of county commissioners, at not to exceed the following maximum amounts: * * *"

And then follow the maximum amounts, depending upon the classification of the counties.

Section 2062 reads:

> "The salaries herein provided for county officers shall be full compensation for all services of every kind and description rendered by the officers named herein. * * *"

Of course, the fee provision in the state law, above, for naturalization, was superseded by the recent federal statute. So there is then no specific provision for collection of naturalization fees, in Utah's law, for the above language to operate upon. That is, the constitutional section particu-

larly directs the legislature to "provide by law, the fees which shall be collected by all officers within the state."

Section 972 of the Comp. Laws of Utah, 1907, did specify a number of fees to be charged by the clerk of the district court.

And then with reference to *those fees so provided for by law of the state,* it is directed in the Constitution, that officers "shall be required by law * * * to pay the same into the proper treasury. * * *" And, pursuant to these provisions of the Constitution, the legislature "from time to time, has passed certain Acts in which the fees for the services rendered by the different officers mentioned in the Constitution, including appellant, are fixed." And, with reference *to those fees so provided for by law of the state,* the law directs that they shall be paid into the county treasury monthly.

After the federal statute of 1906, there was no state statute left to indicate naturalization fees, which the state Constitution refers to in its direction that they be paid into the proper treasury. The state law was superseded by a federal statute, naming different fees. The state Constitution specifically refers to such fees as the *state legislature* may determine upon—and therefore, cannot be directed to any that are provided for in a federal statute.

How different this situation is from that which is before this court now, where we have charter sections providing that:

> "The salaries provided in this charter shall be in full compensation for all services rendered and every officer shall pay all moneys coming into his hands as such officer *no matter from what source derived or received, into the treasury of the city and county within twenty-four hours after receipt of the same*" (Art. XVI, Sec. 34), and "Salaried officers shall not receive nor accept any fee, payment or compensation, directly or indirectly, for any services performed by them in their official capacity, nor any fee, payment, or compensation, for any official service performed by any of their deputies, clerks or employees, whether performed during or after official business hours" (Art. III, Chap. III, Sec. 2).

We have no constitutional sections as in Utah, which limit the application of our charter sections as the application of their general statute is limited.

The California District Court of Appeal, in this case, says (Trans. p. 22, fols. 47-48), in discussing the Eldredge case:

> "* * * it is sufficient to say that it can be readily distinguished from the case at bar. There the law provided that the county officers 'shall be required by law to keep true and correct account of all fees collected by them, and to pay the same into the proper treasury and the officer whose duty it is to collect such fees, shall be held responsible on his bond for the same.' It does not appear from the opinion to have been a condition of the bond, or the duty of the clerk, to perform all official

duties that may have been imposed upon him by law, nor did the statute require the clerk to pay all moneys, 'no matter from what source derived', into the treasury of the county."

We respectfully submit that the Utah case is clearly distinguishable.

Fields v. Multnomah County (Supreme Court of Oregon, Jan. 7, 1913), 128 Pac. 1045 (brief of plaintiffs in error, pages 15, 32, 39).

Section 3116, *Lord's Oregon Laws*, was adopted in 1898 (L. O. L., page 1232); Laws 1898 (Sp. Sess., page 8, Sec. 8). It provided that:

"The fees, percentages, commissions and charges *now established by law*, or in any manner allowed, for the performance of any act or duty by or required of the * * * clerk of the circuit court * * * shall continue and remain the established fees, percentages, commissions, and charges for such act or duty; and the respective officers herein named are hereby required to collect * * * said fees, percentages, commissions, and charges, * * * and said officers shall pay over the same to the county treasurer of Multnomah County * * *."

At that time Section 3105 L. O. L., page 1223, Laws 1882, page 46, fixed the fees of the county clerk, and provided that he should receive

"for filing and making a certified copy of a declaration to become a citizen of the United States, fifty cents; for entering judgment of admission of an alien to citizenship, and making a certified copy thereof, $1.00."

Later, this was amended, raising the amounts, respectively, to $1.00 and $5.00.

L. O. L., Section 3107, page 1226; Laws 1905, c. 213, 370.

Section 3122 (L. O. L., page 1234, Section 14, Laws of Oregon, Special Session 1898, page 10) provided that:

> "No fees, percentages, commissions or compensations, shall be allowed or paid * * * any officer named in this Act, to be retained by him, other than the salary fixed by law for such officers."

Turning to Section 8 of this Act, we read (Laws of Oregon, Special Session 1898, page 8):

> "The fees, percentages, commissions, and charges *now established by law*, or in any manner allowed, for the performance of any act or duty by or required of the * * * clerk of the circuit court * * * shall continue and remain the established fees, percentages, commissions, and charges for such act or duty * * *."

This was a proceeding in mandamus to compel the defendants to audit and pay the salary of plaintiff as county clerk of Multnomah County for the months of July and August, 1911.

Defendants refused to audit or pay his salary as above because he had collected certain fees under the federal naturalization law of 1906, and appropriated the same to his own use.

A peremptory writ was issued.

The court relied on Art. I, Sec. 8 of the federal Constitution, directing that

> "the Congress shall have power * * * to establish a uniform rule of naturalization * * * throughout the United States * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers", etc.

The court says that:

> "under this provision, unquestionably the Congress has jurisdiction over the subject of naturalization of aliens, and this jurisdiction is exclusive."

Citing:

Inhabitants of Hampden County v. Morris, 207 Mass. 167; 93 N. E. 579; Ann. Cas. 1912 A. 815;

Chirac v. Chirac, 2 Wheat. 259, 4 L. Ed. 234;

Dred Scott v. Sandford, 19 How. 393, 405; 15 L. Ed. 691.

In the above case of *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234, it was held that the power of naturalization was exclusively in Congress, i. e., that an Act of Congress would prevail over a state statute on the question of general qualifications for citizenship, etc. This is undoubtedly good law.

In the above cited case of *Dred Scott v. Sandford*, 19 How. 393, 405; 15 L. Ed. 691, the only thing decided in point here is that the United States has the power to determine who shall be citizens of the United States and that no state can interfere with

this power. We can have no quarrel with such a rule.

The other case cited above, *Inhabitants of Hampden County v. Morris*, we shall discuss infra.

Then the Oregon Supreme Court in this case of *Fields v. Multnomah County*, goes on to say that:

> "For the purpose of the administration of the naturalization Acts, all courts having jurisdiction under the Acts are federal courts."

Citing:

> *United States v. Aakervick*, 180 Fed. 137, which is also cited to the same point at page 32 of brief of plaintiffs in error.

That case decided that for the purpose of the naturalization acts, all courts having jurisdiction under the Acts are federal courts in the sense that a federal court can vacate a judgment of a state court or vice versa. And that is certainly sound law and not in conflict with the theories which we are contending for.

Cranson v. Smith, 37 Mich. 309, 26 A. R. 514, is then cited in support of the following text:

> "Where any right or privilege is subject to the regulations of Congress, it is not competent for state laws to impose conditions which shall interfere with the rights or diminish their value."

In the above case of *Cranson v. Smith* the provision of the federal Constitution being considered

was Art. I, Sec. 8, subd. 9, which confers upon Congress the power

> "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

A Michigan statute attempted to discriminate against the sale of patent rights by providing that no promissory note given in payment therefor would be valid in the hands of any holder whatever unless there was prominently written or printed on its face "given for patent right". This was held an unconstitutional attempt to make less valuable than other species of property a special right given by Congress by virtue of the above constitutional provision. This surely cannot be considered authority for a rule that the power given to Congress "to establish a uniform rule of naturalization" is interfered with when a state authorizes a county to determine that a specified salary shall be all the compensation that a county clerk shall receive. In the one case the state is interfering with rights guaranteed to the inventor by Congress. In the other, the state is not affecting the rights of persons desiring naturalization, under a law of Congress. It is only dealing with a matter peculiarly of local interest, the terms upon which the county officials may enjoy public office in the county.

We saw above that in this Oregon case, the statute referred to fees "*now* established by law, or in any manner allowed" (i. e., in 1898).

It was *such* fees that the clerk was required to "pay over to the county treasurer."

Among such fees so fixed at that time, by the state law, were fees in naturalization. But the Act of Congress was not passed until eight years later. The court construed the state Act to refer to such fees as were provided for at the time the fee bill was enacted, and to such duties as were enumerated in the state law. That was a question of construction of that particular state Act. There was no such sweeping and general language as we have in the San Francisco charter.

In *State v. Quill* (brief of plaintiffs in error, pages 15, 32), 102 N. E. 106, the appellate court of Indiana held that the clerk of a circuit court was entitled to retain for his own use, the naturalization fees. However, the state statute in that case is clearly distinguishable from the San Francisco charter sections. The Indiana court itself notes the distinction. That statute had already been held by the higher court, the Supreme Court of Indiana, as not requiring county officers to account for any fees *except such as were specified in the state fee bills*, and these naturalization fees as specified in the Act of Congress, were not so enumerated. This was held where the question was whether fees received by reason of some Act

of the legislature had to be accounted for, and it was decided that an accounting was unnecessary because these fees were not enumerated in the state fee bill.

The Indiana statute was interpreted as meaning something entirely different from the San Francisco charter, as interpreted by the Supreme Court of California.

In 102 N. E., at page 107, column 2, and page 108, the court says:

> "While the language employed in the Indiana Act (Section 7324, supra) is broad and comprehensive, yet our Supreme Court has held that a county officer is not required to account to the county for all compensations received by him by virtue of his office; that the Act of 1895 (the Act being interpreted in that naturalization fee case) does not require a county auditor to charge the amount allowed by a former statute for his services as a member of the board of review, as a fee in favor of the county. *Seiler v. State ex rel*, 160 Ind. 605, 615, 65 N. E. 922. * * * Again, in *Estate ex rel v. Flynn*, 161 Ind. 554, at page 577, 67 N. E. 159, at page 167, it was held that the services of the clerk of the circuit court in preparing bar dockets and his per diem allowance for attending court are not fees within the meaning of the Act of 1895, but may be retained by the clerk as his own. The court said: 'It is only the amount of fees which the clerk is to tax and charge as clerk's costs upon proper books as the property of the county, *and not all allowances from whatever source derived.*' From the rule announced in the foregoing cases it would seem to be the settled law of this state that a public officer

> whose compensation is fixed by the fee and salary law is not required to account to the county for all the emoluments of his office, *but only for such fees as are provided for in the statutory fee bills.*"

The distinction is noted by the Indiana court, in discussing our case, at page 108, column 2:

> "*The California case seems to turn on a provision of the charter of the City and County of San Francisco, which required that the county clerk 'shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the City and County of San Francisco within twenty-four hours after receipt of the same.*"

And then the distinction suggested by the California Supreme Court between the San Francisco charter and the Utah statute considered in the Eldredge case, is noted.

When we examine the Indiana statutes we find that the requirement that all fees be turned over to the county, is clearly restricted, as decided by the court, to such fees as the state fee bills provided for.

Section 7353, *Burns Annotated Indiana Statutes*, 1908, reads:

> "Nothing herein contained shall be so construed in any event as to allow any of the officers herein named the salaries herein provided for *and also the fees required to be taxed* * * *."

That is, required in the state fee bills.

Section 7324, *Burns,* 1908, specified certain fees to be charged by clerks of courts, and that *such fees* "shall in no sense belong to and be the property of the clerk, but shall belong to and be the property of the county."

This Act was passed in 1895 and among other things specified certain naturalization fees, different from and superseded by the fees fixed in the Congressional Act of 1906.

That portion of the decision to the effect that the federal Act controls the state law as to the amount of naturalization fees to be charged is, as we saw supra, undoubtedly good law.

Returning to the Massachusetts case cited above by the Oregon Supreme Court, *Inhabitants of Hampden County v. Morris,* 207 Mass. 167, 93 N. E. 579, and cited by plaintiffs in error at pages 15, 32, 39 of their brief, a statute of Massachusetts, as amended in 1908 (Acts and Resolves of Mass. 1908, page 213), authorized the clerks of the different state courts to

> "retain that part of any moneys received by them under or by authority of the naturalization laws of the United States which * * * have actually been expended by them for clerical assistance, travel and other expenses, while acting under said laws."

This was a proviso added to the old section (Rev. Laws, C. 165, Sec. 31), which required the clerks of courts to keep accounts of

> "all fees and money of whatever description or character received by them, or by any assistant or other person in their offices or employment, for any acts done or services rendered in connection with their said offices, and shall on or before the tenth day of each month pay over to the treasurer of the county, or to such other officer as is entitled to receive them, all fees received during the preceding calendar month, and shall render to him an account thereof under oath."

The court held this statute in conflict with the federal Act of 1906, and that the state law must yield. The Utah Eldredge case was relied upon as authority for the ruling.

The theory of the decision is that the disposition of the fees may be regulated by Congress, as incidental to the general control of Congress over naturalization.

The court is, of course right in saying that "the amount of the fees to be charged is a proper subject for congressional regulation." But we cannot agree that "so, too, in our opinion, is the disposition of the fees."

The reason given by the court is for the general accomplishment of good results. And yet the court says (93 N. E., page 581) that

> "if the legislature had seen fit, in reference to the fees for services in naturalization cases, to declare that the statutory salary elsewhere provided should be diminished by the amount received as fees in proceedings for naturalization, the provisions might have been enforced.

> But the statute before us is not of this kind. It does not assume to change the salaries, but attempts to deal directly with the fees received under the law of the United States."

Here the court seems to have been impressed with the fact that the salaries of local officials is a question peculiarly for local control. But an attempt is made to draw a distinction between decreasing the salary by the amount of fees received, and requiring that the fees be turned in to the county treasury.

With the utmost respect for the distinguished court which rendered this opinion, we ask, from the standpoint of "the accomplishment of good results" by the Act of Congress which is the basis of this decision, what possible difference is there? The clerk would be deprived of what Congress intended him to get (admitting the court's interpretation of the Congressional Act), in the one case, just as in the other.

It is respectfully submitted that the court was not sufficiently mindful of the principle of local control of salaries of local officials: of the unconcern of Congress as to where the fees actually went, as between the clerk and the county: and of the simple solution of any difficulty that might arise in the proper administration of the Act, by Congress appointing its own agents, other than local court clerks, and pay them what it may see fit.

This vulnerable part of the reasoning of the Massachusetts court is pointed out by the Wash-

ington Supreme Court in *Franklin County v. Barnes,* supra, 123 Pac., at page 782, column 2, and page 783, where the court says, in quoting the above language used by the Massachusetts court suggesting that the salary of the clerk could have been reduced by the amount of naturalization fees received:

> "Despite the high standing which the Massachusetts court justly holds, its decision as it seems to us, discloses its own fallacy. * * * It is manifest that if there is a real conflict between the state and the federal statutes, and that the Act of Congress is to be construed as making a final disposition of these fees, the conflict could not be obviated nor the purpose of the federal Act defeated by any such subterfuge. We know of no authority for a state, or an individual, doing by indirection what may not be done directly."

The Massachusetts court says at page 581, after interpreting the Act as requiring that the clerk retain his portion of the fees for his own use:

> "As this is the policy of the law under which the court is acting, the legislature cannot nullify the statute by enacting that the clerk shall pay all the money to the county treasurer."

Let us examine the cases cited by the court to support the above text.

> *Farmers etc. Natl. Bank v. Dearing,* 91 U. S. 31, 23 L. Ed. 196.

Congress, under its constitutional powers, passed a National Bank Act. It provided a penalty for the charging of more than a certain rate of inter-

est by national banks. The State of New York by statute provided a greater penalty. Held, that the New York Act must fall.

Central National Bank v. Pratt, 115 Mass. 539, 15 Am. Rep. 138, is practically the same as the case considered immediately, supra.

Davis v. Elmira Savings Bank, 161 U. S. 275; 16 Sup. Ct. 502; 40 L. Ed. 700.

Held that a New York statute providing for the payment by the receiver of an insolvent bank, first, of deposits in the bank by savings banks, could not apply to an insolvent national bank, an Act of Congress requiring ratable dividends on all proved claims.

Parmenter Manufacturing Co. v. Hamilton, 172 Mass. 178; 51 N. E. 529; 70 Am. St. Rep. 258.

Holds that the National Bankruptcy Act takes away from the Massachusetts courts the power to hear petitions for the commencement of insolvency proceedings.

Griswold v. Pratt, 9 Metc. (50 Mass.) 16, is to the same effect as the case immediately, supra.

These are all the cases cited by the Massachusetts court in *Inhabitants of Hampden County v. Morris* for the point that "the legislature cannot nullify the statute by enacting that the clerk shall pay all the money to the county treasurer".

In each of these cases, it was clear that the particular Act of Congress before the court dealt

with a subject over which the states had no control.

At page 580 the court says:

> "It is entirely clear, under this provision, (Art. I, Sec. 8 of the Const. of the U. S.) that the Congress has jurisdiction over the subject of the naturalization of aliens, and that this jurisdiction is exclusive."

We will now examine the cases cited by the court supporting the above language.

Chirac v. Chirac, 2 Wheat. 259; 4 L. Ed. 234.

We saw, supra, that the only thing decided in this case was that the power of naturalization is exclusively in Congress; that an Act of Congress prevails over a state statute in the matter of the qualifications for citizenship etc.

Dred Scott v. Sandford, 19 How. 393-405; 15 L. Ed. 691.

We saw, supra, that the only rule that this case can be here cited for is that the states are subject to the control of Congress in the determination of who is qualified for United States citizenship.

United States v. Wong Kim Ark, 169 U. S. 649-700; 18 Sup. Ct. 456; 42 L. Ed. 890.

This case held that, under the 14th Amendment, providing that

> "all persons * * * in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside,"

a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Empire of China, but are permanently domiciled in the United States and are not in the diplomatic or official service of China, becomes at the time of his birth, a citizen of the United States.

Ex parte Gladhill, 8 Metc. (49 Mass.) 168.

This case decided that under the naturalization Act of Congress of 1802, the police court in Lowell, is a court of record coming within the description of the act conferring naturalization jurisdiction upon "every court of record, in any individual state, having common law jurisdiction, and a seal, and clerk or prothonotary".

Stephens, Petitioner, 4 Gray (Mass.) 559-561.

Holds that although an Act of Congress confers naturalization jurisdiction upon state courts, a state may prohibit its courts from exercising such jurisdiction.

We submit that the cases above cited for the proposition that the jurisdiction of Congress over naturalization is exclusive, have no real bearing upon our question.

We have already discussed the case of *In re Beyer, County Treasurer*, 130 N. Y. S. 281 (brief of plaintiffs in error, p. 15), decided by the Supreme Court of New York, and shown that the court was of the opinion that the Federal Act should

not be construed as requiring the clerk to personally retain the fees, and would have so held were it not for the decision of the Massachusetts court.

We see then that of the five cases cited by counsel for plaintiff in error, three (the Utah, Oregon and Indiana cases) went off on the construction of the state statutes; one, the Massachusetts case, is founded on the extreme theory that "public good" requires the power to be vested in Congress to fix the compensation of local officials in naturalization proceedings. The court itself admits that the local government might decrease salaries by the amount of fees received, and with every respect for the learning of that tribunal, we submit that the court thus destroys its own argument. And the fifth case, by a lower court in New York, was rendered solely on the authority of the Massachusetts case.

The first three cases are not at all in point, for the highest court in California has interpreted the very positive language of the San Francisco charter as requiring the clerk to account to the city and county for these fees. That construction of the charter will not, of course, be disturbed by this court.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 133.

HARRY I. MULCREVY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFFS IN ERROR,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

JAS. F. TEVLIN,
Counsel for Plaintiff in Error
Harry I. Mulcrevy.

(22,948)

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

On the oral argument inquiry was made as to the system of appellate courts now in existence in California. As this subject is not discussed in the briefs leave to file a supplemental brief on the subject was asked and granted to plaintiffs in error.

I.

As for the Supreme Court of California and the counsel for all parties to the action, defendant in error as well as plaintiffs, the cause has been considered as properly before this court on its merits.

The petition for the writ of error avers that the record in the cause was in the Supreme Court (Rec., fol. 85). The prayer of the petition is for a writ of error to the Supreme Court of the United States, "to the end that the record in said cause may be advanced into the Supreme Court of the United States" (Rec., fol. 86). The Chief Justice of the Supreme Court of California ordered that the writ issue, upon bond being given (Rec., fol. 87), and the Chief Justice approved the bond (Rec., fols. 93, 96). The citation was issued under the signature of the Chief Justice and the seal of the Supreme Court (Rec., fols. 98-99). The bonds being given, the writ, commanding the Supreme Court of the State of California to send on the records and proceedings in the cause, was allowed by the Chief Justice of that court (Rec., fols. 100-101). And the clerk of the court makes return of "a duly certified transcript of the within entitled cause, with all things concerning the same," under seal of the court (Rec., fol. 103).

Counsel on both sides agree that, in their opinion, the order denying a hearing in the Supreme Court is a judgment which is reviewable by this court, and that the record sent on by the clerk of the Supreme Court is the record in the cause. The cause is presented, without objection whatsoever from any party, for judgment on the merits.

It was stated on the argument that the Chief Justice of the Supreme Court of California had expressed the view that the writ was properly directed to that court, and that if a mandate were issued reversing the judgment the mandate would be given effect.

II.

At the time the order denying the petition for a hearing by the Supreme Court was made, and at the time the writ of error was applied for and allowed, the court and counsel did not have the guidance of the rule announced in Norfolk Turnpike Company *vs.* Virginia, 225 U. S., 264. The writ in the case at bar issued before that case was decided.

The Constitution of California, which is the only law on the subject, has no provision as to the form or contents of an order of the Supreme Court denying a hearing of a cause which is within its direct jurisdiction and which has been referred to and passed upon by a district court of appeal. The legal effect of such an order must be gathered from the provisions of the constitution and the pronouncements of the Supreme Court in that regard made during the short period the district courts of appeal have been in existence.

III.

The provisions of the State constitution defining the jurisdiction of the Supreme Court and of the district courts of appeal, so far as material here, are as follows:

> "The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases at law * * * in which the demand, exclusive of interest * * * amounts to two thousand dollars * * * the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision as hereinafter provided. * * * The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest * * * amounts to three hundred dollars, and does not amount to two thousand dollars. * * * The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." (Const., art. 6, sec. 4.)

The demand in controversy here amounting to more than $2,000 the case was within the direct appellate jurisdiction of the Supreme Court. To that court the appeals were taken (Rec., fols. 28-29).

When the district court of appeals affirmed the judgment of the superior court it was necessary for plaintiffs in error, in order to open the way to this court, to obtain some action upon the cause from the Supreme Court, as the latter was the highest court of the State in which a decision in the suit could be had. Such action was petitioned for and took the form of an order by the court denying the petition (Rec., fol. 78).

The practice of the court on applications for hearing after judgment by the district court of appeal is stated by the Supreme Court as follows: In cases within the direct appellate jurisdiction of the district court of appeal a hearing in the Supreme Court is granted "only when error appears upon the face of the opinion of the appellate court or when a doubtful or important question is presented upon which we desire to hear further argument." As to cases such as the case at bar the court says in the opinion from which the above is quoted:

> "In causes properly appealed to this court and referred to the district court for hearing and decision, the rule as to rehearings is different; for, if it is contended that the case stated in the opinion of the district court of appeal differs materially from the case as it appears in the record, we feel bound to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars. If so, we order a rehearing notwithstanding the opinion of the district court may be correct on its face, because the complaining party *has a right to the opinion of this court upon the precise case shown by the record*" (Burke *vs.* Maze, 10 Cal. App. Rep., 206).

Now, if the certified transcript is not in the custody of the Supreme Court when a petition for a hearing in a cause

within the direct jurisdiction of that court is under consideration, there are printed copies thereof in its files and the original is under its control. The language above quoted plainly imports that the court has *what it regards and treats as the record*, whether it be the original or not, before it, and examines it and considers the opinion of the district court of appeal to determine whether or no the complaining party has had his right in the premises, that is, "a right to the opinion of this court upon the precise case shown in the record." In addition to this the face of the opinion is considered to see if error appears upon the face of the opinion of the appellate court or if a doubtful or important question is presented upon which further argument is desired to be heard.

The order denying a hearing in the present case is, therefore, tantamount to an affirmance of the judgment on the merits. When the proceedings had upon the petition for writ of error, that is, the granting of the writ and the other proceedings in that regard as above stated, are considered in this connection, it would seem to be beyond question that the Supreme Court so regarded its order.

IV.

Apart from the consideration that the order of the Supreme Court is, in effect, a judgment of affirmance under the authority quoted, plaintiffs in error should be accorded a hearing upon the merits under the authorities of this court as they stood at the time the writ of error was applied for.

1. This court has jurisdiction of the subject-matter of the action, namely, a right claimed by plaintiff in error under a statute of the United States, against which right there is a decision of the State court.

2. This court has jurisdiction of the person of the defendant in error by citation duly served (Rec., fols. 98, 99) and by appearance.

3. "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a Federal question, will, upon a proper proceeding, attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed." Williams *vs.* Bruffy, 102 U. S., 248, 255.

"It has long been settled that if a cause cannot be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a judgment as may be made the basis of proceedings under the appellate jurisdiction of this court" (Gregory *vs.* McVeigh, 23 Wall., 294).

In the case last cited the application was made to the judges, not to the court as such, and it was held, on that account, that the writ of error might issue to the lower court. Referring to the above case, and approving the view expressed in the quotation, this court, in Fisher *vs.* Perkins, 122 U. S., 522, says: "Had the court itself refused the leave upon an application for that purpose, its refusal would have been equivalent to a judgment of affirmance which could have been reviewed in this court." See also Williams *vs.* Bruffy, 102 U. S., 248; Claflin *vs.* Taylor, 115 U. S., 309; Richmond R. R. Co. *vs.* Louisa R. R. Co., 13 How., 71, 80.

The order of the Supreme Court, in the case at bar, denying a rehearing, is analogous to the orders considered in the cases above cited, and should be given a like effect.

4. Besides having jurisdiction, both of the subject-matter and the persons, and a final judgment of the State court, this court has before it the record in the cause. Of this it is assured, first, by authentication of the Supreme Court of California; secondly, by acts and admissions of all the

parties throughout the proceedings, including the oral arguments, treating and declaring the record sent here by the clerk of the Supreme Court as a true record of the cause.

5. Whether the record was lodged in the Supreme Court at the time of the certification is a question which does not go to the jurisdiction of this court.

> "It is, perhaps, safe to say that a writ will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had. We may not be able, in all cases, to reach the record by such a writ, and may be compelled to send out another to a different court before our object can be obtained, but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want" (Atherton *vs.* Fowler, 91 U. S., 143).

And in the same case it is said: "So, too, if we are in any way judicially informed, that, under the laws and practice of a State, the highest court is not the custodian of its own records, we may send to the highest court, and seek, through its instrumentality, to obtain the record we require from the inferior court having it in keeping, or we may call directly upon the inferior court itself" (*Id.*, p. 147).

6. If the mandate of this court should issue reversing the order of the Supreme Court of California, the presence or absence of the record there would be immaterial. By the mandate of this court the cause would be put in the situation in which it was at the time the order denying the hearing was made. At that time the record was, at any rate, under control of the Supreme Court, and if not in the technical custody of that court would have passed into its custody had the order been one granting instead of denying a hearing. If this court shall reverse the order of the State court, the action will take its course in the latter court the same as if the order had been originally a grant, and not a

denial of a hearing. Such is the ruling in Williams *vs.* Bruffy, 102 U. S., 248.

7. Wherever the record may be, this court, having acquired jurisdiction of the cause, may, in order to enforce its judgment, send its process to the court where the record is, or may order final judgment entered in this court.

Williams *vs.* Bruffy, 102 U. S., 248, 255.

In the case cited, there being some difficulty or inconvenience in having the mandate executed in the State court, the mandate was recalled and final judgment reversing the judgment of the State court was ordered entered in this court.

If plaintiff in error Mulcrevy has been thus far denied a right which he has under the act of Congress, this court should not hesitate in doing him justice, for any considerations of procedure, under a new system of courts, not fully defined either in the statutes or the cases of the State in which the case arose. With all the parties joining in a request for a hearing and decision upon the merits, and this inquiry into the procedure adopted being occasioned by the form of the order only, which at the time it was made was sufficient to sustain a proceeding for writ of error, the resolution should be in favor of the jurisdiction.

Respectfully submitted.

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Service of within Supplemental Brief for Plaintiffs in Error acknowledged this 17th day of December, 1913.

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